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IN THE

Supreme Court of the United States

October Term, 1977

No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYEES' RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT V. PHILLIPS,

Petitioners,

vs.

MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHEL L. LEHMAN, individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18,

Respondents.

PETITIONERS' OPENING BRIEF.

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Petitioners,

vs.

MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHEL L. LEHMAN, individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 18,

Respondents.

PETITIONERS' OPENING BRIEF.

Opinions Below.

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 553 F.2d 581 (9th Cir. 1976).

The decision and order granting preliminary injunction by the United States District Court for the Central District of California is reported at 387 F.Supp. 980

(C.D.Cal., 1975). The order granting summary judgment was issued without further opinion and is included in the Appendix, p. 134.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 23, 1976, and amended December 23, 1976. Petitioners' timely petition for rehearing was denied on April 18, 1977. Certiorari was granted October 3, 1977.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Constitutional Provisions, Statutes and Rules Involved.

Involved herein are Article I, Sections 1 and 8 (Clause 18), Article II, Section 3, Article III, Section 1, the 10th, 11th and Sections 1 and 5 of the 14th Amendment of the United States Constitution. The texts thereof are printed as Exhibit A[1] hereto. Section 3 of the Equal Pay Act of 1963 (Pub. L. 88-38, 77 Stat. 56), 29 U.S.C. §206(d)(1); and Sections 703(a)(e)(h) and 706(g) of Title VII of the Civil Rights Act of 1964, as amended in 1972 (the Equal Employment Opportunity Act of 1972), 42 U.S.C. §2000e-2(a), (e), (h) and §2000e-5(g). The texts thereof are printed as Exhibit B hereto. A summary of legislative history of the Equal Pay Act, Title VII of the Civil Rights Act of 1964 and the 1972 amendment is printed as Exhibit C. The Charter of the City of Los Angeles, a state law, §220.1(1)(a)(g) is printed as Exhibit D.

[1]Exhibits refer to attachments to this brief (hereafter Ex. ....). Appendix refers to separately filed Appendix (hereafter App. ....).

Questions Presented.

1. Where females receive the same monthly pension benefits as males, but for longer life expectancies than males, do Title VII and the Equal Pay Act prohibit different pension plan contributions for females and males?

2. Where Congress has not delegated to administrative agencies any quasi-legislative or quasi-judicial authority but has limited statutory jurisdiction to the courts with intent that the courts determine questions of law and fact *de novo,* may the courts abdicate that jurisdiction and defer to the pronouncements of the agencies, especially when the agencies' pronouncements are also shown on their face to be contrary to the expressed will of their principal, Congress?

3. May lower courts adopt a rule of law requiring a municipal employer to pay higher compensation to females than males in view of the jurisdictional limitations of Title VII, the Equal Pay Act, Article III and the 10th, 11th and 14th Amendments of the United States Constitution?

4. Is the decision of the courts below contrary to *General Electric Co. v. Gilbert?*

Statement of the Case.

This case was brought under Title VII of the Civil Rights Act as amended in 1972 (hereafter "Title VII"), claiming a violation of Section 703 of the Act (42 U.S.C. §2000e-2).

Plaintiffs are civil service employees of the City of Los Angeles Department of Water and Power and as such are members of a compulsory retirement Plan owned and managed by such City Department (here-

after referred to respectively as the "Plan" and the "Department").

The Plan provides for several kinds of pension benefits at the employee's option. The most common is a "formula pension". Such formula is a monthly payment equal to 2% of average monthly salary paid during the last year of employment times the number of years of employment. This monthly benefit is guaranteed for life. It is a vested right of the employee. Because women outlive men, the total amount paid as pension to a woman is greater than that paid to a man. (App. 86-88.)

For clarity, this Plan should be contrasted with those pension systems which pay men and women the same *total* pension benefits during their respective life spans, but pay women smaller monthly pension amounts. See, *e.g., Henderson v. Oregon,* 405 F.Supp. 1275 (1975), on appeal in the Ninth Circuit.

The two systems may be analogized to loaves of bread accrued at the date of retirement. In the *Henderson* system, women receive the same size loaf as men but because the life expectancy is longer, the monthly "slices" received by a woman are smaller than those received by a man. In contrast, under the Department's Plan, women are to receive the same size "slice" of bread each month after retirement but because they live longer they must have a longer loaf in order to pay all the "slices".

To fund the Plan, the employees and the Department contribute thereto. To fund the "longer loaf" payable to females, higher contributions are necessarily required for women than for men. Although contributions made by the women themselves were *slightly* higher than the contributions made by men, the Department also

contributed *disproportionately more* for women than for men.

Further, since each employee has an absolute right to the return of all his or her contributions, plus a vested pension right, the present worth of all compensation paid to female employees is higher than the present worth of all compensation paid to male employees.[2]

The following table shows an example of the present value at age 30 of pension benefits of a male and a female; and the present value of contributions necessary to fund a formula pension for each, retirement being at age 65.

	Male	*Female*
1. Age hire	30	30
2. Monthly salary during career	$1,000	$1,000
3. Monthly allowance at 65	700	700
4. Present Value of Pension discounted at 5½% interest and 1951 GA Mortality Table:	9,257	11,886
5. Monthly employee contribution to Plan	22.20 (x 1.1484 =	25.49
6. Department's 110% monthly matching contribution	24.42	28.04
7. Present value (at age 30) of contributions to fund above pension at 5½% and 1951 table:		
a) Member Contribution	4,069	4,743
b) Department's 110% matching	4,476	5,217
c) Additional Department contribution	712	1,926
d) Total Department contribution	5,188	7,143

The contributions by the Department for a woman employee were always greater than for a corresponding man. The amount of compensation for a woman was always greater than for a corresponding man.

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[2]Established state law is that all pensions have present value and City pensions are vested rights. *In re Marriage of Brown,* 15 Cal.3d 838, 126 Cal.Rptr. 633 (1976); *Abbott v. City of San Diego,* 165 Cal.App.2d 511, 517, 332 P.2d 324 (1958).

The plaintiffs herein contended in the trial court that differential contributions by men and women were *per se* illegal. Despite the statutory language that "it shall not be an unlawful employment practice . . . to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid . . .," the trial court erroneously held that *all* differentiation upon the basis of sex was illegal.

> "In short, under the Equal Employment Opportunity Act of 1972, all stereotypic treatment of persons based on . . . sex *whether rational or irrational is dead*." (Emphasis added) 387 F.Supp. 980, 984.

(This Honorable Court has never held that differentiation on the basis of sex is *per se* illegal.)[3]

Based on this view of law, the District Court enjoined withholding larger contributions from females and ordered payment of prior "excess contributions" with interest to be paid to plaintiffs forthwith. The effect of this decision is to mandate the Department to compensate its female civil service employees at an even higher rate in comparison to males than it had previously done.

The primary basis for this decision was reliance on what the District Court viewed as "EEOC amended regulations" (App. 130 and 132).

The District Court subsequently entered summary judgment in accordance with the preliminary injunction opinion.

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[3]*Kahn v. Shevin,* 416 U.S. 351, 40 L.Ed.2d 189, 94 S.Ct. 1734 (1974); *Stanton v. Stanton,* 421 U.S. 7, 95 S.Ct. 1373, 1377 (1975); *Geduldig v. Aiello,* 417 U.S. 484, 495, 41 L.Ed.2d 256, 94 S.Ct. 2485 (1974); *Craig v. Boren,* 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976); *Califano v. Goldfarb,* 430 U.S. 199, 97 S.Ct ...., 51 L.Ed.2d 270 (1977).

Your petitioners appealed contending that by relying on a 1972 EEOC "guideline" as if it were a regulation, the trial court failed to exercise its explicit statutory responsibility to impartially and independently interpret the law *de novo,* and that at all events the "guideline" was *ultra vires* and contrary to Title VII and the Equal Pay Act. Your petitioners contended that they had committed no unlawful employment practice as statutorily defined, and that the decision penalized the employer and discriminated against men, by requiring the employer to compensate women at a higher rate than men.

Similarly, your Petitioners contended that to attempt to lump males and females together as in a so-called "unisex table" would necessarily result in males' contributions subsidizing the females' benefits, and would consequently discriminate against males (see footnote 4, Court of Appeals Dissent, 553 F.2d 581, 598). It's like having men and women *appear* to contribute to equal size "loaves" but then taking part of the loaf of the shorter-living men, to pay "slices" to the longer-living women.[4]

The Court of Appeals repeated the errors of the trial court. Even when the *General Electric*[5] opinion was issued, a majority failed to recognize those errors.

By "deference" to administrative agencies the lower courts conferred on the agencies lawmaking powers that Congress specifically determined *not* to grant, which

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[4]A "unisex" table would also adversely affect non-working women, wives of male employees. (App. 44). Since a high percentage of women are non-working, subsidizing of working women's benefits by the working males would adversely impact non-working wives of male employees.

[5]*General Electric Co. v. Gilbert,* 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976).

Congress specifically intended the agencies *not* exercise, and which this Court in *General Electric* said the agencies did *not* have. Your petitioners were thereby effectively deprived of an impartial *de novo* determination of issues of law and fact, which Congress specifically intended your petitioners be afforded by *independent* determination of the courts. Such ruling undermined the authority of this Honorable Court and nullified its holding and reasoning in *General Electric Co.*

The majority erred in failing to recognize (despite footnotes 17 and 18 in *General Electric)* that it is *not* an unlawful employment practice to differentiate upon the basis of sex in determining the amount of compensation to be paid if the differential payment is not prohibited by the Equal Pay Act.

The respondents take the position that no matter how great the difference in life expectancy, Title VII does not permit differentiation in periodic contributions and benefits.

Since such differentiation is not prohibited, we respectfully request this Honorable Court to direct the entry of judgment in favor of Petitioners.

Summary of Argument.

1. It is not an unlawful employment practice under Title VII and the Equal Pay Act to differentiate upon the basis of sex with respect to employee pension contributions or benefits based upon differential life expectancy. It is not a violation under the plain meaning of the statutes; under the legislative history; or under the law, as applied, in *General Electric Co. v. Gilbert.*

2. In order to hold against Petitioners, the lower courts relied on administrative interpretations of law issued without legislative authority. By such reliance, they abdicated their jurisdiction to determine the law independently *de novo.* After *General Electric v. Gilbert* the majority below relied for "authority" on its inability to "find a conflict" among the administrative interpretations. This case involves a question of law as to statutory interpretation to be decided solely by the courts and the "deference" below exceeded the statutory and constitutional jurisdiction of the courts and denied petitioners their right to *de novo* court determinations.
3. The application of a standard under Title VII and The Equal Pay Act broader than that contemplated by Title VII and The Equal Pay Act or by the Fourteenth Amendment, is contrary to Article III and the Tenth, Eleventh and Fourteenth Amendments to the Constitution.
4. The decision of the courts below was contrary to the opinion of the court in *General Electric,* in that (1) it failed to permit consideration of life expectancy as a factor other than sex upon which differential compensation could be paid; (2) it disallowed under the statute a benefit package which was concededly worth no more to men than to women; (3) it required the employer to pay more to women than to men; (4) it changed the definition of "discrimination" from that enacted in the statute to one permitting no differentiation between the sexes in compensation for any reason.

ARGUMENT.

I

IT IS NOT AN UNLAWFUL EMPLOYMENT PRACTICE TO DIFFERENTIATE BETWEEN THE SEXES WITH RESPECT TO DEFERRED COMPENSATION TO BE PAID UNDER PENSION BENEFIT PLANS.

The lower courts failed to give effect to the plain meaning of the statutes, the explicit legislative intent, and *General Electric Co. v. Gilbert*. The courts incorrectly held that no differentiation in compensation on the basis of sex was allowed by Title VII.

The Statutes.

Title VII prohibits certain unlawful employment practices which it carefully defines. The very same section states that it is not an unlawful employment practice to differentiate upon the basis of sex in payment of compensation. (42 U.S.C. §2000e-2.) It says, in part.

> "It shall not be an unlawful employment practice . . . to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees . . .". (Ex. B-3.)

To assume as did the lower courts that there can be no differentiation upon the basis of sex contradicts the statute. No one can read so much of the statutory language and legitimately conclude that Title VII is a blanket prohibition against differentiation upon the basis of sex with respect to compensation paid or to be paid. According to the statutory language such differentiation is not *ipso facto* an unlawful employment practice.

Whatever act may be listed as an unlawful employment practice in subsections (a)(1) and (2) of section

703, subsection (h) thereof expressly *excludes* from that definition, excludes from the sub-chapter, and exempts from the statutory prohibition any differentiation in compensation upon the basis of sex which is permitted by the Equal Pay Act. (42 U.S.C. §2000e-2(a) and (b)).

The Equal Pay Act in turn says it is not *ipso facto* unlawful *to pay different wages to one sex* than the wages paid to the opposite sex. Differential wages are unlawful *only* if there is no other factor other than sex that is the basis for the wage differential.

It provides in pertinent part:

> "No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate which he pays to employees of the opposite sex . . . for equal work . . . except where such payment is made pursuant to . . . (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) *a differential based on any other factor other than sex* . . ." (29 U.S.C. §206(d).) (Ex. B-1.)

Again, no one can read the language of the Equal Pay Act and conclude that it is *ipso facto* unlawful to differentiate upon the basis of sex in the payment of compensation. Discrimination "*between* employees on the basis of sex" is not *ipso facto* discrimination *against* one or the other.

To reach the opposite conclusion, one would also have to reject the statutory language in Title VII: "It shall not be an unlawful employment practice to differentiate upon the basis of sex in determining

the amount of wages or compensation paid or to be paid to employees . . . if authorized by [The Equal Pay Act]." (Ex. B-3.)

This language is an explicit congressional declaration that Title VII incorporates the earlier act, its standards and policies—that differentiation on the basis of sex in payment of compensation is not *ipso facto* unlawful. *General Electric, supra,* p. 144.

The legislative history (see discussion, *infra*) demonstrates that even before that language was added to Title VII, the intent of Congress was that to differentiate on the basis of sex in the payment of compensation was not an unlawful employment practice *per se*. The above language was added to Section 703, for the purpose of expressing that intent of Congress as positive law.

In 1972, when Congress amended Title VII, it reaffirmed that *only* an adverse action statutorily defined as an "unlawful employment practice" is prohibited. Congress expressly reaffirmed the jurisdictional limitations, which had been added to the legislation in 1964, for the specific purpose of limiting remedies to that conduct which Congress defined as an "unlawful employment practice."

Legislative History.

This Honorable Court held in *General Electric* that differential fringe benefits were not prohibited by Title VII and the Equal Pay Act. The full legislative history only touched on by the Court compels such conclusion. It demonstrates that the employment practice involved herein is not an unlawful employment practice.

1. The Equal Pay Act.

The Equal Pay Act was based *first* on legislative recognition of the fact that the essence of personnel organization is classification of all work in a particular establishment into various classes of "jobs" (or in civil service, "positions"), *e.g.*, "clerks", "drivers", "Stenographers", etc., each of which classes has different tasks to perform, and each of which requires employee abilities or talents *correlative* to the tasks of each class respectively. (Ex. C-1.)

The legislative prohibition was directed to that precise business reality.

Many different forms of legislation for equal compensation were proposed. From among them, Congress chose to enact an amendment to the Fair Labor Standards Act. (Ex. C-1.) That Act was only intended to regulate wage rates. Thus, it states:

> "No employer . . . shall discriminate . . . between employees on the basis of sex by paying *wages . . . at a rate less than the rate* at which he pays *wages* to employees of the opposite sex . . ." (29 U.S.C. §206(d)(1)) (Emphasis added).

The prohibition was directed to paying unequal wages for work of the same class. Where there was another factor other than sex for the wage differential the prohibition did not lie.

Thus, in presenting the bill to the House it was repeatedly pointed out that under the bill an employer might have different classes of workers such as male packagers and female packagers and might pay them differently where there were actual factors of difference as the basis for different pay (109 C.R. 9196, 9209, 2/23/63). If male packagers were required to lift

heavy packages and female packagers were not, more compensation could be paid to the male packagers because of the actual differences between the two classes.

Merely *nominal* differences between the two classes (such as simply *calling* one "packagers" and the other "selectors" when there was no factor of difference between the two classes other than sex) would, of course, *not* authorize a difference in wages paid to the classes.

Similarly, an insignificant difference in the work between the two classes would not of itself authorize a difference in wages paid to each. However, under the prohibition of the Act, employers might continue differential payment based on differential classification when there was a good faith differential and the same was not a subterfuge to pay women less wages for the same work. Previous cases have so understood the Act. *Corning Glass Works v. Brennan,* 417 U.S. 188, 41 L.Ed.2d 1, 94 S.Ct. 2223 (1974); *Schultz v. Wheaton Glass Company,* 421 F.2d 259 (3d Cir. 1970) cert. den., 398 U.S. 905; *Ammons v. Zia Co.,* 448 F.2d 116 (10th Cir. 1971).

Both houses rejected the broad prohibitions and policies of the bill introduced by the administration (Ex. C-1) (109 C.R. 9195, 5/23/63). They did so in four ways: (i) by adding the legislation to the Fair Labor Standards Act and therefore prohibiting only differential wages; (ii) by narrowing the statutory prohibition to unequal wages paid for "equal" work instead of for "comparable" work; (iii) by limiting the authority of the administrator to that of a prosecutor, and (iv) by adding exceptions to the bill which were intended not

merely as "defenses" but which were "exempted from the operation by the statute". Such were consequently not prohibited and this made clear that sex *alone* was the consideration prohibited. The Committee report stated in part:

> "Section 2 of the bill (H.R. 6060) amends section 6 of the Fair Labor Standards Act by adding a new subsection thereto. This subsection, in effect, declares that wage differentials based *solely* on the sex of the employee are unfair labor standard. . . . Three specific exceptions and one broad general exception are also listed. It is the intent of this committee that *any* of these exceptions shall be *exempted from the operation of this statute. As it is impossible to list each and every exception, the broad general exclusion has been also included . . .*" (Emphasis added.) (Ex. C-2.)

As a matter of statutory construction, the broad general exclusion cannot mean factors *not correlated* with "maleness"/"femaleness". Where an employer is making different payments not *correlated* with a male/female classification the statutory prohibition would not apply in any event. It is only where an employer is making differential payments to male/female classes that the Equal Pay Act comes into play. Differential payments for a factor not correlated with "maleness"/"femaleness" is entirely outside the prohibition of the Equal Pay Act in any event. Thus, the intent of the statute is that where there is a factor of difference between the classes, such as "male packagers" lifting heavy boxes and "female packagers" not including that factor, differential wages may be paid to the two sexes.

If, on the other hand, every factor *correlated* with sex classification or with a differentiation based on sex were prohibited by the statute, then the broad general exclusion would have absolutely no meaning at all. Exception (iv) of the statute would become an "empty set" as no case would fall within it. To so interpret the exemption would turn it from "a broad general exclusion" (which Congress intended it to be) into a legal nullity. It would be tantamount to legislative repeal.

Congressional intent as to the scope of the fourth exemption was made clear by explicit history in both the Senate and House.

The Senate Committee bill contained a single exemption, identical to the fourth exemption of the House bill, H. R. 6060. The Senate Committee report declared that such exemption was intended to encompass not only the other three exceptions contained in the House bill, but other cost factors. Since some employers had testified that other costs in employing women (including costs of fringe benefit plans) were higher for women than for men, it was intended to provide that different *wages* might be paid on that ground. In other words, since some employers urged they should be able to pay lower *wages* to women for the same work because other costs in employing women were higher than for men, the Senate Committee report said that such cases would be covered by the fourth exception—where such differential costs existed, lower wages could be paid to women than to men for the same work under the legislation. (Ex. C-4.)

The major premise was, of course, that differential fringe benefits for men and women were not prohibited by the legislation.

An identical legislative intent is shown in the House. There Congressman Findley proposed to amend the pending bill (H. R. 6060) by adding a *fifth* exception to the bill. Such amendment would have, *inter alia,* permitted differential wages where other costs of employing women were greater (such as fringe benefit costs) than employing men to do the same work.

However, the House Committee members urged that the *purpose* of the proposed amendment (as Congressman Findley stated such purpose) was already covered by exception (iv) of the bill and a fifth exception was therefore unnecessary. Differential wages would be paid where other costs of employing women to do the same work were higher, as there would then be another factor other than sex for differential wages.

Thus it was stated with respect to Congressman Findley's proposal to add an *additional* exception (v), that it was redundant since it was already covered by exception (iv). Congressman Thompson (in charge of the bill) said "the language the gentleman [Mr. Findley] would add is redundant"; "the protection the gentleman [Mr. Findley] seeks already exists in the bill. I agree with the gentleman [Mr. Goodell who wrote the bill before the House] that the legislative history should show our intention". Then in direct answer to a direct question from Congressman Pucinski, the Chairman stated that "any other factor other than sex" covered what Congressman Findley was trying to do. (109 C.R. 9217, 5/23/63.)

Finally, after the House passed H. R. 6060, it struck the language of the Senate bill and substituted therefor the language of H. R. 6060. When both bills were then returned to the Senate, Senator Dirksen made

the point that he had spoken with those who would be conferees and "there is general agreement that the House language is quite preferable to the language contained in the Senate bill." (109 C.R. 9762, 5/28/63.) The Senate thereupon adopted the House bill with the *four* exemptions expressly stated.

Thus, the history in both Senate and House is clear that the purpose of the Equal Pay Act was not to prohibit all compensation differentials between the sexes but only such wage differentials where not based on another factor other than sex alone. Pay differentiation upon the basis of sex is prohibited if, but only if, there is no other factor other than sex that is the basis for the pay differential.

2. Title VII.

The face of Title VII as well as its legislative history conclusively demonstrates that although "sex" and "race or color" are treated by the same statute, Congress did not intend to, and did not, treat both matters in the same way.

Secondly, the face of the statute as well as the legislative history demonstrates that neither house of Congress intended to forbid all differentiation upon the basis of sex in determining the amount of compensation paid or to be paid. The 88th Congress which enacted The Equal Pay Act, was well aware of the inherently different problems involved in legislating in regard to sex discrimination, as compared with discrimination on account of race or color.

After it was proposed to add "sex" to Title VII of the Civil Rights bill, the one serious argument advanced in its favor was *not* that the two different

subjects should be treated in the same way but that adding "sex" was necessary to ensure the "color-blind" impact of the law *among women* in the labor market. Further, after the amendment was passed, "sex" was then added as a bona fide occupational qualification without objection of any member of the House. In contrast, the House explicitly rejected an amendment to make "race or color" a bona fide occupational qualification. (Ex. C-5-7.)

When the House Bill (H.R. 7152) reached the Senate there was extensive debate as to whether to refer the bill to Committee to clarify possible ambiguities in the bill. Possible conflict with the Equal Pay Act was specifically mentioned.

Interpretive Memoranda previously relied on by this Court[6] were then introduced to the effect (1) that classification by sex "where there is a rational basis" was *not* prohibited by Title VII; and (2) that the standards of the Equal Pay Act would be applicable in matters of compensation.

Because the House bill was not referred to a Senate committee, an *ad hoc* committee (Senators Dirksen, Humphrey, Clark, Case, *et al.*) met to consider all pending amendments and the views of those who desired to present them. The result of this *ad hoc* committee consideration was an amendment in the nature of a substitute bill (Amendment No. 1052) introduced by Senators Dirksen, Humphrey, and others. It provided that *three* of the Equal Pay Act exceptions would also be exceptions to the Title VII prohibitions—differentials based on a good faith merit system, quantity

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[6]This Honorable Court relied on such Memoranda in *International Brotherhood of Teamsters v. United States, et al.*, ... U.S. ...., 52 L.Ed.2d 396, 424-425, 97 S.Ct. ...., 45 L.W. 4506, 4513 (May 31, 1977).

and quality of work or seniority system (42 U.S.C. §2000e-(h); A-3; 29 U.S.C. §206(a)(1); App. E-8).

The *fourth* exception to the Equal Pay Act which allowed differential compensation for any other factor other than sex and therefore simply prohibited differential compensation for sex only, was expressly adopted by the Bennett Amendment. The manner in which the amendment was adopted demonstrates the intent.

Prior to the introduction of the Dirksen-Humphrey substitute, Senator Dirksen yielded to Senator Bennett who proposed his amendment to the pending House Bill. Thereafter, both Senator Dirksen and Senator Humphrey expressly accepted the Bennett proposal as an amendment to *their* proposal. All three Senators explained the effect of accepting the Bennett Amendment. That intent was to provide, as a matter of law, and not merely as a matter of history, that the prohibitions of Title VII with respect to compensation of the sexes were *not* broader than the Equal Pay Act—that all the exemptions of the earlier act were exemptions to Title VII as well. (Ex. C-12.)

After the Bennett Amendment was accepted, the Senate then substituted the language of the Humphrey-Dirksen bill (as amended by the Bennett Amendment) for the language of the House Bill. Such bill was then the pending business and subject to amendment.[7]

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[7]Proper procedure requires of course that an amendment in the nature of a substitute be voted on "twice". "Even if the [amending] paragraph consitutes the entire resolution and the motion to substitute is adopted, it is necessary then to vote on adopting the resolution as amended since it has only been voted to substitute one paragraph for another." Roberts' Rules of Order (rev. ed.), p. 142. This procedure protects the right of an individual to vote in favor of substituting the language of proposal "B" in preference to proposal "A", and then to vote against enacting "B" as law.

Senator Humphrey was then specifically asked "as floor manager of the bill" about the impact of the pending bill on retirement systems. Senator Randolph, who asked the question, had been co-author of the Senate subcommittee's equal pay bill which was identical to H.R. 6060. Senator Humphrey was the floor manager of the pending civil rights bill and also had presented the Senate Committee's equal pay bill. He also had expressly accepted the Bennett Amendment to clarify the effect of the Humphrey-Dirksen bill in regard to equal pay between the sexes. In answer to Senator Randolph's question, Senator Humphrey agreed that accepting the Bennett Amendment made it unmistakably clear that "*differences of treatment in industrial benefit plans,* including earlier retirement options for women, *may continue in operation under this bill* if it becomes law." (Emphasis added.) (See *General Electric, supra,* p. 144, 50 L.Ed.2d 343, 359.)

The express purpose for this colloquy was to plainly set forth Congressional intent as to the effect of the Bennett Amendment. (Ex. C-15-16.)

The House thereafter adopted the Senate bill. In so doing, it specifically recognized and affirmed the Senate intent. (Ex. C-16.)

Thus, the legislative history confirms that Congress carefully considered, and carefully drafted legislative language which would make clear that it is not an unlawful employment practice, to differentiate upon the basis of sex in determining the amount of compensation paid or to be paid as pension plan or other deferred compensation benefits. To differentiate upon the basis of sex where differential compensation paid or to be paid is based on the factor of life expectancy is not an unlawful employment practice under Title VII.

3. 1972 Legislative Action.

In 1972 Congress considered and rejected proposals to broaden Title VII. In rejecting such proposals, it also expressly reaffirmed major points of its 1964 action.[8]

The 1972 action is important for three reasons.

First, Congress reaffirmed that *only* those adverse actions that are statutorily defined as *unlawful employment practices* constitute unlawful discrimination under Title VII. In so doing, Congress rejected proposals to redefine discrimination in terms of "systems and effects" (House Committee Report, U.S. Code, Cong. & Adm. News, 1972, pp. 2143-44, 2150-52.)

Second, Congress rejected proposals to give the administrative agency any legal authority either to develop its own definition of discrimination, or to exercise *any* quasi-legislative or quasi-judicial authority. It also rejected the premise of the House Committee bill that the EEOC had special "expertise". (Ex. C-23-25.)

Third, it reaffirmed the requirement that court ordered remedies not apply unless the court find the employer has *"intentionally"* engaged in an unlawful employment practice as statutorily defined. (Ex. C-26.)

In 1964, each house of Congress had added limitations to the jurisdictional provision to make clear that they were not defining unlawful discrimination in any new or unusual way. The 1972 action reaffirmed that intent. Under the 1972 action, the courts could employ additional remedies if (but only if) an *unlawful employment practice* had been committed. Congress rejected the proposal that a new definition of unlawful discrim-

[8]"As the sentiments of men are known not only by what they receive, but what they reject also, I will state the form of the Declaration as originally reported." Thomas Jefferson, *Autobiography*, p. 21 (Mod. Lib. Ed.)

ination could be developed by the courts beyond that statutorily defined. (Ex. C-23-27.)

This most recent expression of legislative intent is controlling.

Application of the Statutes.

The Bennett Amendment and Congressional history demonstrate that Congress dealt with the problem of differential compensation based upon factors correlated with sex *differently* than Congress dealt with *other* classifications of employees, *Griggs v. Duke Power*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) or with discrimination against an individual employee, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

In contrast with both those cases, the present one involves classification or differentiation upon the basis of sex with respect to compensation paid or to be paid to persons in each class.

Here the Department withholds from gross salary a pension contribution based on age, sex, salary and length of service. This contribution, together with the entire pension plan benefit is deferred compensation.

The Bennett Amendment excludes from the definition of unlawful employment practice differentiating or classifying "upon the basis of sex in determining the amount of the wages *or compensation* paid or to be paid to employees" if such differentiation is permitted by the Equal Pay Act. Such Act authorizes what it does not prohibit.

In determining the amount of compensation paid or to be paid under that Act, the employer may pay less if other costs of employing women to do work of the same class is greater than for men. Since pension

costs for females are concededly greater than for males the employer could pay less wages or compensation in other forms. (Exs. C-3-4 and C-15-16.)

Furthermore, the employer may also differentiate upon the basis of sex with respect to compensation where the factor for which differential payment is made, though correlated with sex is a factor other than sex. Here the factor is life expectancy.

Given the recognized difference in life expectancies, it is impossible to have equal periodic pension benefits unless the females or the employer or both contribute more for the females, or unless the males subsidize the females. Certainly, the statute does not require the employer to pay women more than men, but only to refrain from paying women less where there is no rational basis for the wage differential. Longevity and the cost of funding for it are two distinct "other factors" specifically recognized by both houses as a basis for differentiation. (Ex. C-4-5.)

It is universally recognized that females as a group outlive males. (*General Electric v. Gilbert, supra* at 144; *Reed v. Reed,* 404 U.S. 71, 75, 30 L.Ed.2d 225, 92 S. Ct. 251 (1971); *Gallentine v. Fiero,* 110 Cal.App. 345, 346, 294 Pac. 59, 60). Plaintiffs' counsel conceded the fact. [Rptr. Tr. p. 36, October 24, 1974.] Nor is the fact changing. This is shown by the Department's own experience on which the Plan is based (App. 87) as well as general studies. ("Sex Differentials in Mortality Widening, "*Metropolitan Life Statistical Bulletin* Vol. 52, (December 1971) pp. 3-6; United States Census Bureau study cited in "The Economic and Actuarial Aspects of Selection and Classification" by Joseph S. Gerber, *Forum,* Vol. X, No. 4, Summer 1975; Population Estimates and Projections, *Projections of the Population of the United*

States: 1977 to 2050, U.S. Department of Commerce Bureau of the Census, July 1977, p. 1). Such data show that the difference is *widening* at a time when more and more women are entering the work force. The above cited July publication of the Bureau of the Census indicates a projected 9.2 year difference between males and females in life expectancy by the year 2050.

That Congress did not intend under the statutes to disregard the differences in life expectancy can also be concluded from the fact that Congress has continued to recognize the differences in other statutes dealing with pension benefits. The Internal Revenue Code, for example, continues to value male and female annuities differently for tax purposes (26 U.S.C. §72 (c)(3)(A), Regs. 1.72-9). The Employee Retirement Income Security Act of 1974, "ERISA", funding standards require actuarial soundness (26 U.S.C. (IRC 1954) §410 *et seq.*), and when enacted clearly contemplated use of sex-differentiated mortality tables. Indeed, the Pension Benefit Guaranty Corporation requires valuation of plan assets and benefits to be measured by six sex-differentiated mortality tables, 29 CFR 2610, 2611, 41 F.R. 48484-48491.

Finally, this Honorable Court in application of Title VII, 1) implicitly recognized that differential payment based upon longevity was payment for another factor other than sex which was permitted by Title VII (*General Electric, supra* at 144), and 2) that Title VII did not require an employer to contribute *more* for female employees than for males. (*General Electric, supra* p. 139 fn. 17).

This conclusion is confirmed by the legislative history of the 1972 amendments to Title VII.

There Congress *rejected* a proposal to authorize redefinition of unlawful discrimination in terms of "systems and effects". (Ex. C-24.) Here the "system" is classifying employees upon the basis of sex for pension purposes; the "effect" is that women employees as a class have *greater* deferred compensation in all forms and, with the *higher* employer contributions, considerably *higher* present economic worth.

The "systems and effects" are, however, irrelevant. The only question is whether an adverse action as statutorily defined has been committed. Since the Bennett amendment sanctions the practice here involved that question must be answered in the Department's favor.

II

THE LOWER COURTS ABDICATED THEIR RESPONSIBILITY TO RENDER A DE NOVO INTERPRETATION OF THE LAW AND REACHED A RESULT CONTRARY TO STATUTE.

In *General Electric,* it was urged that the Court defer to administrative interpretations of the statute and thus abdicate its own responsibility to determine the law. The Court declined to do so. It held the administrative pronouncements were not regulations and it would not abdicate its constitutional responsibility. (*Id.* at 145.)

The lower courts in the instant case did the opposite. They assumed incorrectly that the administrators had the power to make authoritative pronouncements on the meaning of the statute. By "deference" to such pronouncements the lower courts failed to exercise their responsibility to independently and impartially determine the law. After *General Electric,* such "deference" represents a failure to exercise its authority *under* the Supreme Court.

These circumstances, in light of clear Congressional provision and intent on the matter, require that the problem be explicitly addressed.

Legislative Action and Intent.

1. Equal Pay Act.

In enacting the Equal Pay Act, Congress established the Administrator as a prosecutor. In so doing, Congress was well ware of *Skidmore, et al. v. Swift & Co.,* 343 U.S. 134 (1944) interpreting the Fair Labor Standards Act. In that case, the Court had addressed the question whether a particular industry-wide practice constituted "overtime" in that industry. The Court held that the Administrator's experience in the practices of that industry constituted a body of experience as to matters of *fact* upon which the *fact-finder* might properly rely.

The Court carefully noted that it was a matter of *fact* being considered. Regarding administrative bulletins, the Court pointedly observed "they do *not* constitute an interpretation of the Act. . . ." 343 U.S. at 139. (Emphasis added). Rather, they were in the nature of expert testimony or opinion based on wide and specialized experience in matters of *fact* in an industry.

Under the Equal Pay Act, however, the legislative history demonstrates that Congress intended that the *bona fide* judgments of the employer as to work classifications *in a particular establishment* not be displaced by claimed superior expertise of the administrator

as to industry-wide practice as to the most appropriate manner to classify the work in that establishment.

The prosecutor had the burden of proof as to the propriety of a classification made in a given case. (Ex. C-18-19.) Thus, where the prosecutor showed that an employer made a classification of work (day shift/night shift) but then abandoned differential payment for that time factor, the Court held there was no factor other than sex shown for the previous wage differential but it was solely because of sex.[9] *Corning Glass Works v. Brennan,* 417 U.S. 188 (1974).

With respect to matters of law, Congress was even more explicit. Congress purposely *withheld* from the Administrator all authority to issue regulations. (Ex. C-18-19.)

Congress noted that there are three levels of pronouncements which an administrator might direct *to the public*: 1) legislative regulations, 2) interpretive regulations, and 3) bulletins. Congress noted that the Administrator might issue bulletins, not because of any delegation of power from Congress, but rather because of inherent authority in *any* prosecutor to advise *the public* of the cases he will prosecute.

However, Congress intended that the bulletins not be given any standing in court *except as a defense* where relied upon by the defendant. It was not to be used against a defendant. It might be a *shield*

[9]Where *prima facie* equality as to all factors except payment to the sexes is shown, the defendant has the burden of *producing* evidence that another factor other than sex is the basis for the differential payment; the prosecutor retains the burden of proof and persuasion that it is because of sex alone. *Cf. McDonnell Douglas v. Green, supra.* (See Ex. C-18-19.)

but it was not to be a policy making sword. (Ex. C-19-20.)

It is well established that the weight (if any) "to be given to interpretive rule varies with its statutory and administrative context. . . ." *United States v. Stapf,* 375 U.S. 118, 127 n. 11, 84 S.Ct. 248, 255, 11 L.Ed.2d 195 (1963). Here Congress intended that bulletins be given no weight in the scales of justice *against* a defendant, but only in defendant's favor. (Ex. C-18-21.)

Similarly, in *General Electric v. Gilbert, supra,* p. 144 this Court cited bulletins of the Administrator not as being correct interpretations of the statute that the administrator had authority to issue and a court might therefore follow. Rather, they were cited as administrative recognition of a *fact*—a factor of difference between the sexes—that life expectancy in females is greater than in males (which Congress intended be recognized under the law). Moreover, the Court cited those bulletins to hold in *favor* of defendant, not to hold against it.

Even if there were no Congressional history, *Skidmore, et al. v. Swift & Co.* does not authorize deference to bulletins as interpretations of the statute, or the meaning of law. Hence, for the lower courts to have concluded as they did that bulletins and guidelines are "entitled" to deference as interpretations of law against a defendant constitutes either a delegation or an abdication of judicial power. To say (as the lower courts did) that they are "regulations" binding on the defendant and the Court, is an even greater error. It denies defendant the right to an impartial and independent *de novo* determination that Congress intended the defendant be afforded by the Court under the statutes.

2. Title VII and 1972 Amendments.

In considering equal pay legislation, a major concern was to draft legislation that would not make government the determiner of proper employment standards and practices generally. That same general concern was manifest under Title VII.

The bill originally proposed had provided that the EEOC was to have both quasi-legislative and quasi-judicial authority. Both were stricken from the bill. Instead, the House determined that EEOC was to act as prosecutor—the same administrative pattern as set up under the equal pay bill. (Ex. C-21.)

The House pointedly added the word "procedural" to the EEOC's authority to issue *procedural* regulations. On record keeping and procedural regulations, EEOC was to comply with usual requirements of notice and opportunity to be heard. (Ex. C-21-22.)

The EEOC was authorized to bring suit on "reasonable cause"—a phrase which was intended to make very clear that EEOC had no authority to make, and would not make, *any* determination on ultimate issues of law or fact. Such are to be determined by the Court *de novo*. *McDonnell Douglas v. Green, supra.*

An EEOC's decision is like a policeman's decision to make an arrest. Since the statute says EEOC can act on "reasonable cause", it follows that the court may *not* regard an EEOC decision to act as a finding of ultimate fact or conclusion of law to which the Court may defer.

In 1964, the Senate further limited the EEOC to the role of a conciliation agency, to attempt conciliation

as a condition precedent to an individual bringing suit in a federal court. Consistent with the legislative intent that the Act impose no new burdens in States having FEPC laws, Congress intended that the conciliation process also be attempted as a prerequisite to filing suit, through State agencies.

In 1972, Congress enlarged the EEOC authority from a conciliation agency to a prosecutor. In so doing, both houses of Congress again rejected proposals to delegate quasi-legislative or quasi-judicial authority to the agency. A major reason for so doing was the view that the agency is an advocate, a partisan of a viewpoint, and that the defendant should receive an *impartial* determination *de novo*. (Ex. C-24-27.)

The view which prevailed in the 1972 legislation was expressed by the minority of the House Committee in the following terms:

> "We contend that the EEOC has attained an image as an advocate of civil rights, and properly so. For this very reason, we submit that it cannot be an impartial arbiter of the law. An advocate, by nature, represents one side of an issue. How can he then be asked to apply the law without prejudice?" (U.S. Code, Cong. & Adm. News, 1972, p. 2168.)

The same objection goes to a prosecutor's extra-judicial pronouncements as to the meaning of a law. If an advocate's interpretations are afforded *a priori*, "greater weight" the defendant is not afforded an impartial determination of the law.

3. Application.

There are three major problems with respect to administrative pronouncements raised herein.

First is the matter of administrative faithfulness to the will of the principal. It is basic to constitutional government that the executive branch is to "take Care that the Laws be faithfully executed." (U.S. Const. Art. II, Sect. 3, Ex. A-1.) A similar principle exists in the law of agency—that the agent (the administrator) is to be faithful to the will of its principal (Congress).

The problem is twofold. First, where the agent has not been granted authority to speak for the principal, he exceeds the authority of his agency by purporting to act with authority to speak for the principal. Thus, where the Secretary of Labor purports to have authority to speak for Congress in executing the law—to issue authoritative pronouncements as to the intent of the statute, the Secretary is acting outside both the authority of his agency and the explicit Constitutional limitations upon the executive branch. Likewise, EEOC so acts outside its agency when it pretends to have authority to speak for Congress on the meaning of law when Congress has not given it that authority.

Here, for example, bulletins and guidelines have been published in the Code of Federal Regulations as if they were regulations. They were referred to, and relied on, as regulations by the lower courts in the instant case even though the defendant/petitioners repeatedly urged they did not have such status and this Court in *General Electric* so held. "Reasonable cause" decisions of the EEOC were likewise relied upon as though they were authoritative interpretations pursuant to a Congressional grant of authority. The fact that

the EEOC not only does not have such authority but also determined to give its pronouncements the *ostensible* appearance of authority looking for reliance thereon by "busy federal judges" is well documented. Blumrosen, *Administrative Creativity: The First Year of the Equal Employment Opportunity Commission*, 38 Geo. Wash. L.R. 694 (1970). (C-22.)

As a matter of additional importance, it is significant that the earliest EEOC testing guidelines in 1966 were simply a statement of what the EEOC "advocates" and "recommends". This was the earliest administrative interpretation by the agency of the scope of its own authority. It was only after certiorari was granted in *Griggs v. Duke Power Co., supra,* that EEOC without notice published new testing guidelines in a format that made them appear as regulations.

The problem herein is not only a matter of the administrative agency acting outside its grant of authority, it also results in 1) a failure of the judiciary properly to exercise its jurisdiction and 2) a denial of defendants' rights.

If, for example, the agencies did have authority to issue substantive regulations or make quasi-judicial determinations, the defendants would be entitled to notice and opportunity to be heard. If they had been pronounced without such due process minimums, the court would disregard them. However, here the bulletins and guidelines (which are *not* on matters of fact based

on industry-wide expertise but are interpretations of law) were issued without either notice or opportunity to be heard.

Nevertheless, the lower courts treated them as if they were to be "deferred to" even above the decision of this Honorable Court in *General Electric v. Gilbert*. They treated them as if such administrative pronouncements were not merely to "guide the public" as to the administrator's views, but were to "guide *the courts*" and "guide" the courts even ahead of the judgments of the only Court established by the Constitution itself. This makes the courts simply the arm of the administrator. They treated the pronouncements not merely as the administrator's views with no standing in court against defendant (as Congress intended) but rather as conclusive determinations of matters of law. Even regulations and quasi-judicial decisions of agencies that have been duly delegated such authority are not entitled to such "weight". In such cases a defendant may challenge a regulation as being *ultra vires*. Of course where that issue is raised the regulation is not itself the measure of the meaning of the statute. Similarly, a quasi-judicial determination is only presumptively correct, as to matters of fact. The defendant in such cases is entitled to judicial review on matters of law and to rebut the presumption on adverse findings of fact.

Here, however, the courts treated the administrative pronouncements (which were also in content directly contrary to the statute they purported to "interpret") as if they were above the statute, and the agent above the will of the principal.

Thus, even if the Secretary of Labor or the EEOC issued a bulletin or guideline that they were going

to prosecute pension plans requiring differential contributions such pronouncements would be entitled to no standing in court against a defendant, as a matter of legislative intent. (Ex. C-19.)

The question is not whether a defendant "violated" any such pronouncement. The question is whether the practice is an uniawful employment practice as *defined by statute*. And on that issue the administrative pronouncements are entitled to no weight, except as relied on by a defendant in his defense.

To hold otherwise is to hold that the agent may bootstrap itself into authority not granted by its principal. Such "deference" renders the administrator prosecutor, judge and jury without ever appearing in the case.

The practice is doubly wrong here. Here the administration sought in 1972 to have the Legislature redefine "discrimination" (or to permit the EEOC or the courts to do so) and to have the Legislature delegate quasi-legislative and quasi-judicial authority to it.

Having failed in the Legislature, the EEOC then issued new "guidelines" post-1972 and sought as an "amicus" in both courts in the instant case to have the *courts* adopt those new interpretations as defining prohibited conduct under the statute and "recognize" the EEOC as having quasi-legislative and quasi-judicial authority.

The success of this improper action by the EEOC is shown by the fact that the District Court made an express finding that the EEOC "amended its regulations" in 1972, and the District Court based its judgment on such "amended regulations." (App. 130 and 132.)

The EEOC had similar success in the Court of Appeals. While this Court explicitly pointed out in *General Electric* that "guidelines" are *not* regulations, even the Dissenting Opinion referred to them as "regulations." (553 F.2d 598.)

The second, analogous matter, concerns the agents' faithfulness to the will of principal in matters of the laws' content. Where the agent purports to have authority to speak for the principal, others may mistakenly take the agents' pronouncements as being in *content*, a faithful representation of the will of the principal. The courts erroneously so took them here.

Thus, while the statute states that it shall not be an unlawful employment practice to differentiate upon the basis of sex in payment of compensation, yet the courts below concluded (relying on administrative pronouncements) that the *purpose* of the statute was the direct opposite, namely, to prohibit all such differentiation. (C-28-29.)

The majority Court of Appeals initially found "conflicts" among the administrative pronouncements in its original opinion, as did this Court in *General Electric v. Gilbert*. On rehearing the majority below could "find" no conflict.

Searching for "conflicts" among administrative pronouncements entirely diverted the court from the primary issue before it and from its constitutional and statutory responsibility—to determine the meaning of the *statute*.

The issue is not whether the employment practice is condoned or condemned by administrative pronouncements or briefs filed by the administrator (who is an advocate or partisan even when appearing as "amicus"). The issue is rather whether the statute itself prohibits a practice in question.

Viewing the statute through the "glasses of interpretation" provided by the administrator substitutes different statutory prohibition for the one expressed by Congress. (Ex. C-28-29.)

The jurisdictional limitations of Title VII contemplate that the courts give effect to the statute both in respect to what conduct Congress prohibited and in respect to the *absence* of quasi-legislative and quasi-judicial authority in the agency. For the lower courts to have disregarded the Congressional will and intent on either point is to act outside their own jurisdiction as expressly limited by the statute. It also denies to the Petitioners that right to an *impartial* determination of issues that both the Constitution *and* the statutes guarantee. As to your individual petitioners it is a denial of due process of law guaranteed by the Fifth Amendment.

III

THE DECISION BELOW IS IN EXCESS OF THE COURT'S JURISDICTION UNDER ARTICLE III AND CONTRARY TO THE 10TH, 11TH AND 14TH AMENDMENTS TO THE CONSTITUTION.

The decision of the lower courts—requiring an irrational classification with respect to compensation—exceeded Article III and the 14th, 10th, and 11th Amendments to the Constitution.

The 1972 Amendments to Title VII were enacted by Congress under §5 of the Fourteenth Amendment which empowers Congress to enforce that amendment by appropriate legislation. (*Garland M. Fitzpatrick v. Frederick Bitzer*, 427 U.S. 445 (1976).) *Ergo*, legislation adopted by the Congress pursuant to the Fourteenth Amendment must be tested by Fourteenth Amendment standards.

Two results follow. First, the statute could not provide for a violation without the requirement that the employer have a discriminatory purpose. (*Washington v. Davis*, 426 U.S. 229, 245, 48 L.Ed.2d 597, 610-611, 96 S.Ct. 2040 (1976).)

The legislative history makes it plain that this was in fact what Congress had in mind when it adopted both Title VII and the Equal Pay Act. Good faith classifications were to be permitted. The requirement of "intent" on the part of the employer was specifically added to Title VII and this was reaffirmed by the 1972 legislation. (Ex. C-26-27.)

Where the classification itself is not rational or *bona fide*, the employer's personal subjective intent as to the *means* to perpetuate or accomplish that classification[10] is irrelevant. *Griggs v. Duke Power, supra.*

On the other hand, where the classification is rational or *bona fide* there is no unlawful practice unless unlawful intent is shown. *Teamsters v. United States, supra,* ..... U.S. ....., 52 L.Ed.2d 396, 432 fn. 50.

Second, the concept that *all* differentiation based upon sex with respect to compensation is illegal was

[10]In *Griggs v. Duke Power* the Court treated the employment practice as one of "classification" covered by Section 703(a)(2). The work (and workers) had been classified as "laborers" and "coal handlers", but this was merely a difference in name only, and not based on actual differences in the work of the "classes" or correlative abilities demanded thereby. If the standards regarding work classification intended by the Equal Pay Act were applied to the facts, the classification would be not rational or *bona fide*. The use of a written test by the employer as a means of perpetuating such classification does not change the problem or alter the conclusion. *Every* employment standard and its application is a "test" to classify employees or applicants for some purpose. Where as in *Griggs*, the particular "test" is employed to perpetuate or accomplish an arbitrary, artificial and unnecessary classification ("laborer"/"coal handler") that tends to adversely affect the employment status of a "laborer" because of race, a violation is shown as the Court held.

clearly never a part of equal protection under the Fourteenth Amendment. Rational classification is the standard and this is the standard Congress adopted. Such rational classification was expected under the Equal Pay Act and Title VII. Factors such as seniority, merit, quality and quantity of work were obvious bases for rational classification and were so recognized in the statute and legislative history.

So, too, sex itself was recognized as a rational classification with respect to compensation where another correlated factor was the basis for the pay differential. Similarly, sex is a rational classification where the factor is an occupational qualification *bona fide.*

The 1972 amendments reaffirmed the 1964 definition of unlawful "discrimination." (Ex. C-24-26.)

The fact that Congress did not intend exceeding standards of the Fourteenth Amendment was recognized by this Court in *General Electric*. "We should not readily infer that it meant something different than what the concept of discrimination has traditionally meant, . . ." (*General Electric, supra,* 429 U.S. 145, 50 L.Ed.2d 343, 360.) This conclusion is supported by additional legislative history not quoted in the Court's opinion.

The Honorable Court has construed the Due Process and Equal Protection provisions as not prohibiting classifications such as defendants' Plan where there is a rational basis therefor. *Kahn v. Shevin* (1974) 416 U.S. 351, 40 L.Ed.2d 189, 94 S.Ct. 1734; *Schlesinger v. Ballard* (1975) 419 U.S. 498, 42 L.Ed.2d 610, 95 S.Ct. 72; *Geduldig v. Aiello* (1974) 417 U.S. 484, 41 L.Ed.2d 256, 94 S.Ct. 2485.

Similarly the statute on its face and its legislative history show that a classification related to sex "where

there is a rational basis" (Ex. C-1-4) is *not* prohibited unless the plaintiffs show such is not in good faith or is a subterfuge. See *Schultz v. Wheaton Glass Co.*, 421 F.2d 259 (3d Cir. 1970), *cert. den.* 398 U.S. 905. The Dissent below so concluded.

It cannot be supposed that Congress is empowered by Section 5 of the 14th Amendment to enact legislation *prohibiting* classifications that are *permitted* by the 14th Amendment. Hence if Congress had enacted a law prohibiting rational classifications or requiring irrational ones, it would be acting in excess of its 14th Amendment power.

Consequently, assuming *arguendo* that the trial court was correct that even "rational" classification is prohibited (and irrational classification therefore required) by Title VII, it would follow necessarily that to that extent Congress acted in excess of its 14th Amendment power.

Such exercise of power would therefore have to be sustained, if at all, under some other grant of power—the commerce clause, for example.

But this Honorable Court has held that the Tenth Amendment is a limitation on the exercise of the commerce clause power in respect to cities. Such amendment provides that powers not delegated to the United States are reserved to the States, and the authority of Congress to regulate in a manner which invades local sovereignty is limited thereby.

Thus this Honorable Court has held that Congress may not regulate compensation of civil service employees. The court stated in *National League of Cities v. Usery* (1976) 426 U.S. 833, 49 L.Ed.2d 245, 253:

> "We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the *matter*, but because the Constitution prohibits it from exercising the authority in that *manner*." (Emphasis added.)

Management of the City Department's retirement plan is likewise a function of local government under state law (Charter §220.1, California Stat. 1937, Chap. 3, Resolutions, p. 2627). (Ex. D-1.) The City Charter Section 220.1, and similarly, California Government Code Section 45342, require that the Plan be maintained on a sound actuarial basis. Requiring refunds of previous contributions prior to retirement interferes with actuarial soundness in a manner not required by equal protection or due process.[11]

Further, despite the majority Opinion below that the Department could pass on the cost of refunds by increasing all contributions or lessening benefits, such is not permitted by State law or by the Equal Pay Act. (State Law) *Houghton v. Long Beach*, 164 Cal.App.2d 298, 306 (1958); *Henry v. City of Los Angeles*, 201 Cal.App.2d 299, 314; (Equal

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[11]Even where there may be an unlawful employment practice an award of back pay is to be denied where the practice was in reliance on state law. *Kober v. Westinghouse Electric Corporation*, 480 F.2d 240, 248 (3rd Cir. 1973); *LeBlanc v. Southern Bell Tel. & Tel. Corp.*, 460 F.2d 1228 (5th Cir. 1972); *Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219, 1227 (9th Cir.); *Manning v. General Motors Corp.*, 466 F.2d 812, 815-816 (6th Cir. 1972). So, here, the trial court's finding of lack of good faith (Finding 7, Conclusion 7, App. 130 and 132) after the EEOC "amended its regulations" in 1972 presumes incorrectly that the EEOC has legislative authority.

Pay Act) (*Corning Glass Works v. Brennan,* 417 U.S. 188, 207, 41 L.Ed.2d 1, 17, 94 S.Ct. 2223 (1974), 29 U.S.C. §206(d)(1)). The Department is penalized by the decision because it must now reach into other city revenues to pay the difference. (See *Edelman v. Jordan* (1974) 415 U.S. 651, 653.)

It is likewise interfered with by the permanent injunction. Any legislation of Congress under either the Fourteenth Amendment or under the commerce clause, for example, which interferes with the authority of local governmental entities to establish pension plans for its civil service employees would be an invalid invasion of local sovereignty. So would a law requiring payment of higher compensation to female civil service employees than males.

For the same reasons, the permanent injunction of the lower court and its award of back contributions exceeds the limitations of the Tenth Amendment. Such amendment is a limitation on all the powers delegated to the United States, including the judicial power delegated by Article III, and not merely a limitation on those legislative powers that have been delegated to the Congress by Article I. As the Congress may not enact a law which interferes with local sovereignty, so the Court may not issue a decree which so interferes.

Assuming *arguendo* that by enacting Title VII Congress had enacted a law which required the payment of higher compensation to female civil service employees than to males, for the courts to give effect to such a law would exceed the constitutional limitations on the *courts'* power. The court may not so act. That was the precise holding of *Marbury v. Madison,* 1 Cranch 137, 2 L.Ed. 60 (1803). The Court held that it would *not* exercise a power (even though Con-

gress purported to confer or acknowledge it) when to do so would have the effect of the Court exceeding constitutional limitations upon it. The duty of the Court, the Chief Justice said, is to "read and obey" the law which *limits* the Court's power.[12]

For the same reasons dealing with the Tenth Amendment, we submit that there also is a violation of the Eleventh Amendment by the decisions below, *i.e.,* that to apply the statute in a manner outside the purview of the Fourteenth Amendment removes it from Congressional authority under the Fourteenth Amendment. In *Fitzpatrick v. Bitzer, supra,* 427 U.S. 445, 456, fn. 11, the Court noted that such challenge was not raised there. We have raised and do raise such a challenge.

There is another major jurisdictional limitation exceeded by the decisions below. Section 5 of the 14th Amendment gives the *Congress* the authority to enforce that article by appropriate legislation. That grant of authority is, we submit, exclusive. Especially where (as here) the Congress has *exercised* that authority, where it has enacted certain policies into law, it is not within the powers of either the executive or the judicial branch to give effect to *different* policies even for the purposes of "enforcing" the 14th Amendment. Any different view would lead to governmental chaos.

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[12]The rationale of the decision was that prerogative power (including the power to issue prerogative writs) was a power over and above and outside law. John Locke, for example, so described the power in his treatise *On Civil Government.* The Court held it must act under and according to law. Even though Congress recognized authority in the Court to issue such writs and exercise such prerogative power, the Court would not do so. In contrast, the courts below held they might exercise power even where not limited to them by Congress. The entirely different idea that the Court had authority *superior* to legislation was introduced in *Dred Scott v. Sanford* (1856) 19 How. 393, 15 L.Ed. 691.

We have above noted the express jurisdictional limitation on the executive's following different policies. The executive is charged that "the laws be faithfully executed" (Art. II §3.) The limitation of faithfulness likewise applies to any agent (such as the EEOC) that is an agency of Congress, its principal. The EEOC may not act except under and pursuant to the authority delegated by Congress.

Express limitations also exist with respect to the courts' authority. Congress has clear constitutional authority to specify the jurisdiction of the courts. Const. Art. III. *Sheldon v. Sill* (U.S. 1850) 8 How. 440, 12 L.Ed. 114; *Ex Parte McCardle* (U.S. 1869) 7 Wall. 506, 19 L.Ed. 264.

Thus, where, as here, Congress has not only exercised the authority granted by Section 5 of the 14th Amendment, but has also limited the courts' jurisdiction under that statute to those "adverse *actions*" as are defined by the statute and are "intentionally engaged in", it is not within the courts' power to develop broader definitions of unlawful discrimination in terms of "systems or effects" or otherwise. In fact it was to prevent that possibility that led to adopting the jurisdictional limitation in 1964. While in 1972 it was proposed to permit the development of a broader definition of unlawful discrimination in terms of "systems and effects", that proposal was rejected and the jurisdictional limitations expressly reaffirmed. (Ex. C-24-26.)

Since 1972 the courts may now exercise broader *remedial* authority than under the 1964 statute, *after* it has been found that an "adverse action" as statutorily defined has been "intentionally engaged in". However Congress in 1972 again precluded the courts from

any "common-law-making" role in defining unlawful employment practices by express reaffirmations of the jurisdictional limitations of Title VII. (Ex. C-26.)

Of course Congress may so limit the courts. "There can be no question of the power of Congress to define and limit the jurisdiction of the inferior courts of the United States." *Lauf v. E. G. Skinner & Co.*, 303 U.S. 323, 330 (1938). Where the courts act in excess of statutory jurisdiction they also act in excess of Article III.

The trial judge herein seemed unconcerned with the statutory language. He did not even make the findings which the statute requires as the condition precedent to the exercise of the courts' *remedial* jurisdiction under the statute (Ex. B-4-5), namely, that the City was "intentionally engaging in" an unlawful employment practice as statutorily defined. The trial court likewise ignored the jurisdictional limitation on an award of "back pay"—that such shall not be awarded if the action of the employer was "for *any* reason other" than discrimination[13] on account of sex (Ex. B-4-5). These lapses of the trial court, plus its reliance on the EEOC "amended regulation" demonstrate that the trial court was not exercising its statutory *judicial* jurisdiction, but some new legislative jurisdiction.

That the Court may not act in excess of statutory jurisdiction (even if it had "enforcement" authority

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[13]There was extensive and careful attention given to the meaning of "discrimination" in the 1963-64 debates. The Congressional Record is very clear that although the *opponents* of the bill charged it had a new broad, sweeping meaning, the *proponents* of the bill whose intent is controlling said that it had the same well established meaning it already had under a number of already existing statutes. (110 Cong. Rec. 7218, 5803, 5437, 7477.)

under the Fourteenth Amendment) is one of the foundations of the "checks and balances" of American government. See *Sheldon v. Sill* (U.S. 1850) 8 How. 440, 12 L.Ed. 114; *Ex Parte McCardle*, 7 Wall. 506, 19 L.Ed. 264.

IV

THE DECISION OF THE LOWER COURT IS CONTRARY TO GENERAL ELECTRIC V. GILBERT.

General Electric.

In *General Electric*, the Court recognized the appropriateness of life expectancy (correlated with sex) as a factor other than sex for which differential compensation was allowed by the Bennett Amendment, under Title VII. *General Electric, supra*, p. 144, 50 L.Ed.2d 343, 359.

The Court noted the acceptability under Title VII of a benefit package which was not proven to be worth more to men than women. *General Electric, supra*, 50 L.Ed.2d 343, 356.

The Court noted the appropriateness of the use of actuarial tables to show that a benefit plan was not a mere pretext to invidiously discriminate. *General Electric, supra*, 131-135, 50 L.Ed.2d 343, 354. On the other hand, in this case the courts below made the erroneous assumption that Title VII *requires* a municipal employer to pay *greater* economic benefits to one sex than to the other. They failed to correct this error even after this Honorable Court said:

> "The District Court was *wrong* in assuming, as it did, 375 F.Supp. at 383, that Title VII's ban on employment discrimination necessarily means that 'greater economic benefit[s]' must be required

> to be paid to one sex or the other because of their differing roles in 'the scheme of human existence.'" *General Electric, supra*, 50 L.Ed.2d 343, 356, fn. 17, 97 S.Ct. 401, 410, fn. 17. (Emphasis added.)

That the statutes do not require payment of greater benefits to one sex than the other is evident from their provisions.

The Equal Pay Act provides:

> "[A]n employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

To raise the compensation as to women generally above that of a man, "reduces" compensation as to men by comparison.

Title VII does not require any of the alternatives suggested by the courts below, all of which would have the effect of requiring that the employer pay females more or that the male employees (and their wives) subsidize larger female employees' benefits. We do not contend on the record here presented that the employer may not voluntarily pay more to fund the larger female life expectancies; we do contend that such is not *required* by the statute. The statutory prohibition is directed to payment of unequal *wages* for equal work. *A fortiori* compensation may differ. A rational *bona fide* classification is sufficient under the statutes.[14] For the lower courts to require the payment of more compensation to one sex than the

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[14]Such conclusion would resolve the "no-win" situation raised by the men's complaint that the Plan unlawfully discriminates against men. (App. 81.)

other as they did, violated the statutes before them on their own rationale.

The majority opinion of the Court of Appeal infers that the failure to include a number of other characteristics which arguably may also affect longevity, such as smoking, drinking and obesity, makes sex differentiated actuarial tables unacceptable.

Such reasoning is its own refutation. If sex plus age (*i.e.* longevity) can not be an "other factor other than sex" warranting a payment differential under the Bennett Amendment in and of itself, the addition of other characteristics will not make it so. The addition of other characteristics will not alter the underlying basic difference in life expectancy between males and females of the same age. It will only add other characteristics—sex-neutral characteristics—on top of "differentiation upon the basis of sex." (42 U.S.C. §2000e-2.)

Either age plus sex-differentiated actuarial tables are permissible under the Bennett Amendment, or they are not. Either they constitute invidious discrimination or they do not. To hold that they might be acceptable if they also incorporate differentiation for smoking, drinking, obesity, and the like, is to acknowledge that such tables are acceptable.

The mere fact that your petitioners could have incorporated other characteristics affecting longevity does not mean that they must, nor does it invalidate the characteristics used. This Court rejected a similar argument regarding the disability program's failure to exclude other disabilities than pregnancy in *General Electric*.

As noted in *General Electric*, the package here provided covers the same category of risk for males and

females. There is no proof that the package is in fact worth more to men than women. The pension cost is nothing more than extra compensation. Remove the fringe benefit and increase wages by the amount paid for pensions by the employer, and the female would still have to pay more than the male to purchase an annuity paying the same periodic benefits as the male's. *General Electric, supra,* pp. 138-139. The respondents seek to have the employer compelled to pay the difference. Title VII does not require it.

Conclusion.

The order of the courts below which was outside the statute would have drastic, widespread consequences to government and industry, threatening the financial stability of pension systems at a time when many such systems are already severely strained and freeze into law a system adversely affecting male employees and their female non-working spouses. It was not the intent of Congress to cause such significant and sweeping consequences to government and industry. *Willingham v. Macon Telegraph Publishing Co.,* 507 F.2d 1084, 1090 (5th Cir. 1975).

The law sought by respondents is contrary to the Equal Pay Act and Title VII, which on the face of both statutes, permit the differentiation provided in petitioners' Plan. Furthermore, legislative history clearly shows that Congress intended to allow different life expectancy to be differently treated by the employer.

To reach the result below, the courts had to ignore the statutory language, and the legislative intent, and instead defer to interpretative bulletins of the administrative agencies, in the face of the will of Congress and this Court's judgment to the contrary.

In reaching the result below, the court further applied a standard outside the purview of the Congressional authority under the Fourteenth Amendment. Essentially the court said *all* differentiation regardless of intent violates the law. The court refused to find a discriminatory purpose, refused to allow any classification such as that permitted under the Fourteenth Amendment, and in so doing, violated its responsibilities under Article III of the Constitution and Title VII which limits its jurisdiction. To sustain such determinations of the courts below, would therefore violate the Tenth and Eleventh Amendments to the United States Constitution.

Since respondents have conceded the actuarial premise underlying the petitioners' Plan, it is submitted that it would be appropriate for this Honorable Court to remand the case to the court below with directions to enter judgment on the Title VII issue in favor of your petitioners. Petitioners respectfully request that the Court of Appeals' decision, therefore, be reversed with such directions to the District Court.

Respectfully submitted,

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EXHIBIT A.

United States Constitution
Article I, Sections 1 and 8 (Clauses 9 and 18).

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 8. The Congress shall have power—

. . .

To constitute tribunals inferior to the Supreme Court.

. . .

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article II, Section 3.

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Article III, Sections 1 and 2.

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to

time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizen of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State, or the citizens thereof, and foreign states, citizens, or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

Tenth Amendment.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Eleventh Amendment.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Fourteenth Amendment, Sections 1 and 5.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

EXHIBIT B.

Fair Labor Standards—29 U.S.C. § 206.

(d) (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or

any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

42 U.S.C. § 2000e-2.

Unlawful Employment Practices.

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any

such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

* * *

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under

this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

* * *

42 U.S.C. § 2000e-5(g).

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

EXHIBIT C.

Legislative History of Acts.

I.

The Equal Pay Act.

In enacting the Equal Pay Act, the 88th Congress specifically intended that employers might continue to classify people as "men" and "women" for compensation purposes so long as the classification involved actual or good faith differences as the basis for the differences in pay and was not a mere subterfuge to pay women less for work of the same class.

1. *The House Substantive Provisions:*

Both the House Committee Report and Supplementary views detail the important background to the Equal Pay Act. (U.S. Code, Cong. & Adm. News, 1963, pp. 688 *et seq.*) The same was spelled out on the House floor.

A number of changes had been worked out in previous sessions of the House. However "unfortunately the administration incorporated only a few of these changes when it submitted a new equal pay bill . . . this year. . . . Fortunately . . . Mr. Goodell introduced . . . bill . . ." for the first time to amend the Fair Labor Standards Act. (109 C.R. 9195; 5/23/63.)

"The concept of equal pay for jobs demanding equal skill has been expanded to require equal effort, responsibility. . . . These factors are the core of all job classification systems." (109 C.R. 9195.)

. . . .

"A bona fide job classification system will normally furnish the answer to a claim of discrimination." (109 C.R. 9196.)

The House Committee noted that an employer might pay male packagers and female packagers differently where there were real and not merely nominal differences as the basis for the different pay. (109 C.R. 9196, 9209; 2/23/63.) If the male packagers were required to lift heavy boxes and the female packagers were not, more compensation might be paid to the male packagers.

The Committee Report pointed out that it was prohibiting pay differentials based *solely* on sex and not on some correlated factor. "Supplementary Views" accompanying the Committee Report also announced the rejection of the administration's broad policy. The differences in the two bills were also explained by the Committee on the House floor.[1]

The House Committee Report said in part:

> "Section 2 of the bill (H.R. 6060) amends section 6 of the Fair Labor Standards Act by adding a new subsection thereto. This subsection, in effect, declares that wage differentials based *solely* on the sex of the employee are unfair labor standard. . . . Three specific exceptions and one broad general exception are also listed. It is the intent of this committee that *any* of these exceptions shall be *exempted from the operation of this statute. As it is impossible to list each and every exception, the broad general exclusion has been also included* . . ." (Emphasis added.)

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[1]"I think it is important that we have clear legislative history on this point. . . . The clear intention was to narrow the whole concept. We went from 'comparable' to 'equal' . . ." (109 C.R. 9197, 5/21/63.) "The burden would be on the Department of Labor to prove the exceptions are *not* true." (109 C.R. 9208, 5/23/63). (Emphasis added.)

The intent of the broad exclusion is shown by explicit legislative history on the House floor. Congressman Findley offered an amendment to the bill to add an *additional* exception that would permit *inter alia* differences in wages if there were other costs to the employer in employing women in the same work class as men, so as not to penalize the employer for so employing women. (109 C.R. 9217.)

This amendment was rejected on the ground that there was no necessity for such *additional* exception as the matter was already covered by exclusion four. The House Committee chairmen and members stated they wanted the legislative history to be clear. Thus, Congressman Thompson (in charge of the bill) and "the language the gentleman [Mr. Findley] would add is redundant"; "the protection the gentleman [Mr. Findley] seeks already exists in the bill. I agree with the gentleman [Mr. Goodell who wrote the bill before the House] that the legislative history should show our intention". Then in direct answer to a direct question from Congressman Pucinski, the Chairman stated that "any other factor other than sex" covered what Congressman Findley was trying to do. (109 C.R. 9217, 5/23/63.)

Thus the controlling legislative history and the explicit language of the House Committee bill (H.R. 6060) which became the law, shows that it is certainly *not* the intent of law to require the employer to pay women more total compensation than men.[2]

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[2]Both houses considered longevity as a basis for adding the general exception to the Equal Pay Act. (See H.R. 6060, quoted in H.R. Rep. No. 309, 88th Cong. First Sess., 7 (1963); s. 1409, quoted in S. Rep. No. 176, 88th Cong. First Sess.,

(This footnote is continued on next page)

2. *The Senate Substantive Provisions:*

The Senate history shows the same specific intent.

The Senate Sub-Committee (of which Senator Randolph was co-chairman) held hearings and substituted a bill with four exemptions for the Administration's bill. (S. 109 C.R. 2886, 2/25/63.) Senator Randolph was co-author of the Sub-Committee bill. (109 C.R. 8915, 5/17/63.) The Senate Committee, in turn, substituted a bill with only the single broad exception—any other factor other than sex. The intent of the Committee bill was that the fourth exception included *inter alia* the other three exceptions of the Sub-Committee bill.

The Senate Committee Report accompanying the bill noted that in addition to these exceptions, the Senate intended to allow additional exceptions under that broad category where "an employer will be economically penalized by the elimination of a wage differential. . . ." because other costs such as pension costs were higher for women.[3] This intent, expressed by

4, 6 (1963). Hearings before the House and Senate in March and April of 1963 placed before Congress the higher cost of retirement benefits for women than for men, and was a factor providing impetus for the addition of the subsection (iv) exception. Hearings on H.R. 3861 and Related Bills, before the Special Subcommittee on Labor of the House of Representatives, 88th Cong. 1st Sess. (1963), 103, 184-186 and 241; Hearings on S. 882 and S. 910 before the Subcommittee on Labor of the Committee on Labor and Welfare, United States Senate, 88th Cong., 1st Sess. (1963) 142 and 145.)

[3]The Senate Report said in part:

> "During the course of the hearings, testimony was introduced on the question of the cost which employers encounter in the employment of women which they do not encounter in the employment of men. . . . Some employers stated that the costs of their pension and welfare plans were higher for women than men because of maternity costs in their health benefits and because of the longer lifespan of women in pension benefits. . . . It is the intention of the committee that where it can be shown that on the basis of all of the elements of the employment costs of both men and women, an employer will be economically penalized by the elimination of a wage differential, the Secretary can permit an exception similar to those he can permit for a bonafide seniority system or other exception above mentioned." (109 C.R. 8915, 5/17/63). The House bill which was enacted did not leave "approval" to the Secretary but required the Secretary to prove a violation in court.

the Senate Report, was identical to the intent of Congressman Findley's amendment which the House likewise stated was included in the fourth exemption.

The Senate passed the Senate Committee bill with only the broad fourth exclusion. The House, after adopting H.R. 6060, struck the language of the Senate bill and substituted therefor the language of H.R. 6060. When both bills were then returned to the Senate, Senator Dirksen made the point that he had spoken with those who would be conferees and "there is general agreement that the House language is quite preferable to the language contained in the Senate bill." (109 C.R. 9762, 5/28/63.) The Senate thereupon adopted the House bill with the *four* exemptions expressly stated.

II.

Title VII of Civil Rights Act.

The same 88th Congress which adopted the Equal Pay Act also enacted the Civil Rights Act. The original legislative proposal came from the Justice Department.

1. *House Action Substantive Provisions.* When Title VII was debated, Congressman Smith (Va.) proposed to add the word "sex" to various sections of

the title (110 C.R. 2577, 2/8/64). One serious argument was presented in its favor, first by Congresswoman Griffith and then by others. (110 C.R. 2578-80, 2/8/64). The argument was *not* that discrimination on account of sex should be legislatively treated in the same way as discrimination on account of race or color. The argument was *rather* that the addition of "sex" was necessary to ensure "color blind" application of Title VII among women in the labor market. The *absence* of the amendment, it was urged, could have a practical effect of giving women of one race, color or religion a practical edge over women of another race, color or religion, in the labor market[4] (110 C.R. 2579, 2582, 2583, 2584, 2/8/64).

The opposition to the amendment was likewise based on "the experience which the Congress had with respect to the equal pay legislation" and other experience which dictated that legislatively, discrimination on account of sex should *not* be treated in the same way as discrimination on account of race or color. (110 C.R. 2581, 2577-8, 2582).

After the amendment passed, Congressman Goodell proposed adding "sex" as a bona fide occupational qualification. (110 C.R. 2804, 2/10/64.) The Goodell

[4]The argument was stated in its baldest form by Congresswoman May, by quoting "a letter from Emma Guffey Miller, national chairman of the National Woman's Party" to the effect that regardless of what Congress intended the bill would be interpreted and applied in a way that would give an advantage in the job market to certain classes of women and result in discrimination against other women and that the bill should be amended to avoid that result by adding "sex". [110 C.R. 2582, 2/8/64].

amendment was accepted without question (110 C.R. 2804). The House had previously rejected an amendment to make "race or color" a bona fide occupational qualification. (110 C.R. 2550, 2/8/64.)

Thus, the House did not intend to treat "sex" and "race or color" the same way or to prohibit all classifications of employees as "male"/"female" (e.g., women nurses to care for women. [110 C.R. 2718, 2/10/64]).

The legislative proposal as it came from Committtee permitted the courts to apply remedies *unless* the action of the employer had been "for cause." This implied a very broad jurisdiction in the Courts; and that the burden was on the employer to show that the "failure to hire" etc. was for cause.

The House Committee changed the language[5] on the House floor to make clear that actions by the employer "for any reason other" than the prohibited five reasons were *not* unlawful and it is outside the jurisdiction of the court to order remedies unless the employer's action was for a prohibited reason. (110 C.R. 2566, 2/8/64.)

When the bill reached the Senate, Senator Humphrey explained that the purpose of the language was to

[5]"Mr. CELLER. Mr. Chairman, the purpose of the amendment is to specify cause. Here the court, for example, cannot find any violation of the act which is based on facts *other*—and I emphasize 'other'—than discrimination on the ground of race, color, religion, or national origin. The discharge might be based, for example, on incompetence or a morals charge or theft, but the court can only consider charges based on race, color, religion, or national origin. That is the purpose of this amendment." (110 C.R. 2566.)

clarify that action for reasons other than those five prohibited were not unlawful.[6]

2. *Senate Action Substantive Provisions.* When the House bill (H.R. 7152) reached the Senate, extensive debate centered on whether the bill should be referred to the Senate Committee already conducting hearings on the Justice Department bill (110 C.R. 3715, 2/26/64). Both Senators Dirksen and Morse favored such referral.[7] One of the major concerns was to establish clear legislative history. The other concern was to give considered study to the possible effects of the bill as drafted. (110 C.R. 2884, 3715, 6445-6451).

Extensive debates focused on questions and objections to the House bill as drafted, even before the bill was made the pending business. Senator Dirksen introduced a memorandum of objections regarding matters as to which clear legislative intent was essential. (110 C.R. 3715, 3719, 4754, 6417, 6450, 6455).

In a succession of procedural steps the Senate determined to consider the bill on the floor instead of referring to a regular committee (110 C.R. 3719, 4754, 6417, 6455).[8]

Thereafter because of major concerns of Senators Dirksen, Humphrey and others that due consideration be given the bill because of its possible effects, five major determinations were made regarding consideration and preparation of a proper bill.

(1) First Senator Humphrey (floor manager of the entire bill) and Senator Clark and others purposely undertook to make a daily analysis of all views presented concerning the bill, including the views of those who favored a bill but had genuine concerns about some aspect of it. (110 C.R. 4858; 3/10/64.) These

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[6]"This relief is similar to that available under the National Labor Relations Act in connection with unfair labor practices, 29 United States Code 160(b). No court order can require hiring, reinstatement, admission to membership, or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of section 707(e), which makes clear what is implicit throughout the whole title; namely that employers may hire and fire, promote and refuse to promote for any reason, good or bad, provided only that individuals may not be discriminated against because of race, religion, sex, or national origin. . . ." (Senator Humphrey, 110 C.R. 6561.)

[7]Both senators were fully conscious of their legislative duty. Senators Dirksen and Morse were both members of the Senate Judiciary Committee. They were aware that in the House, the House Judiciary Committee had adopted the Attorney General's bill, as a substitute for the Sub-Committee bill, with little time to examine the Justice Department's proposal. (House Report No. 914, 11/20/63, U.S. Code Cong. & Adm. News, 1964, pp. 2355, 2414-15.) The Senate Committee had heard only one witness on the bill, the Attorney General who had drafted it [110 C.R. 3715, 2/26/64]. Senator Dirksen particularly, but Senator Morse as well, thought that proper discharge of the Senate's duties required that a committee hear and consider views, other than those of the Attorney General, regarding a bill that could have profound social, economic and political impacts as the House bill seemed to portend [110 C.R. 2884, 3715, 6445-6451].

[8]The Senate tabled an appeal from a parliamentary ruling [110 C.R. 3719 2/26/64]; the Majority Leader, Senator Mansfield, made a motion to make the bill the pending business [110 C.R. 4754 3/9/64] which was adopted [110 C.R. 6417 3/26/64]; and it tabled Senator Morse's motion to refer the bill to the Judiciary Committee with directions to report it back on a date certain [110 C.R. 6455 3/26/64].

It had already been announced by the Senate Majority Leader when the bill was received from the House, that when the Senate took up the bill that Senator Humphrey would manage and speak for the bill on the Senate floor, with Senator Kuchel speaking for the minority party [110 C.R. 2882-3 2/17/64]. Further, when it appeared that the bill would not go to Committee, it was announced that two senators would be in charge of each title of the bill, with Senators Clark and Case for Title VII [110 C.R. 4858-59 3/10/64].

analyses were presented as a daily "newsletter".[9] The intent of the bill according to its proponents was fully exposited therein. The newsletters were distributed to all Senators and subsequently printed in the Record.

This procedure is particularly important to a proper interpretation of the Act. Reading of the debates makes clear (as it was clear to the Senate itself) that "it is the first time I ever recall when major legislation was being considered on the floor that the opponents of a bill have sought to place on the measure a broader interpretation than have the proponents." (Senator Ribicoff, 110 C.R. 8427.)

In short, the statements of the opposition can not be taken as implying the intent of the bill. Adoption of the bill was a *rejection* of the views of the opposition.

(2) The second major determination was to have an "ad hoc committee" consider the varying views presented and prepare a substitute bill.[10]

Because of the genuine concerns of a number of Senators on a number of issues, (and there were hundreds of amendments that had been introduced) Senator Humphrey, Senator Dirksen, Senator Clark and others, formed an *ad hoc* committee to consider the views

[9]This procedure was objected to by opponents of the bill [110 C.R. 5044] but defended on the ground that it was essential that the proponents make their position clear to other Senators. These newsletters were distributed to all Senators and then published in the Congressional Record [110 C.R. 7474, 4/9/64; 110 C.R. 9105; 110 C.R. 14464, 6/19/64].

[10]Senator Dirksen introduced several amendments in the earlier stages of the debates [110 C.R. 8192 4/16/64] but the principal results of this *ad hoc* committee approach were two amendments, No. 656 [110 C.R. 12817, 11926, 11935] and No. 1052 [110 C.R. 13310]. Each was presented as a Dirksen-Humphrey *et al.* bill; each was in the nature of a substitute for the House bill (H.R. 7152); and when the later (No. 1052) was presented, it displaced the earlier (No. 656).

of all Senators and prepare a substitute bill. The Dirksen-Humphrey, et al., substitute bill was later introduced. It was first introduced as Amendment No. 656, and later as Amendment No. 1052. (110 C.R. 12706-7, 12807, 12817, 12831, 11926, 11935).

This ad hoc committee procedure permitted a substantial majority to consider, amend, and understand the substitute bill in its entirety before voting closure.[11]

(3) The third major determination pending the preparation of the substitute bill was to prepare and introduce interpretive memoranda as to the intent of the House bill, in addition to speeches presenting the House bill and the later presented Dirksen-Humphrey bill.[12] Senators Clark and Case in charge of Title VII of the House bill prepared and introduced interpretive memoranda declaring the intent of that Title. (110 C.R. 7203-59.)

In doing so they answered a question as to the intent of the House bill relating to the instant case.

[11]The second Tower amendment on testing, considered in the case of *Griggs v. Duke Power, supra,* was offered without objection, after cloture had been voted. The amendment was acccepted by Senator Humphrey, *et al.,* as stating the intent of the Title even without such amendment.

[12]Thus, Senator Humphrey spoke to the bill [110 C.R. 6528 3/30/64] and then Senator Kuchel [110 C.R. 6554, 3/30/64]. Senators Clark and Case not only explained the bill [110 C.R. 7203-7259 4/8/64] but also introduced interpretive memoranda [110 C.R. 7213] including memoranda answering questions of Senator Dirksen and others [110 C.R. 7215-18].

Senator Humphrey, too, made an extended presentation of the substitute bill's terms [110 C.R. 12706, 12807 6/4/64]. Senator Dirksen had made similar explanations and had introduced a memorandum explaining the differences between No. 656 and the House bill [110 C.R. 12381, 12817]. (The major difference between substitute No. 656 and No. 1052 concerned jury trial.)

Such question had been earlier raised by Senator Dirksen. (110 C.R. 6445-51.) The Memorandum stated:

> "Objection: The sex antidiscrimination provisions of the bill duplicate the coverage of the Equal Pay Act of 1963. But more than this, they extend far beyond the scope and coverage of the Equal Pay Act. They do not include the limitations in that act with respect to equal work on jobs requiring equal skills in the same establishments, and thus, cut across different jobs.
>
> "Answer: The Equal Pay Act is a part of the wage hour law, with different coverage and with numerous exemptions unlike title VII. Furthermore, under title VII, jobs can no longer be classified as to sex, *except where there is a rational basis for discrimination,* on the ground of bona fide occupational qualification. *The standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under title VII.*" (110 C.R. 7217) (Emphasis added).

Thus Congress did not intend to outlaw rational differentiation, or rational classification,[13] although the lower courts herein held to the contrary.

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[13]Senator Clark in presenting Title VII agreed that sex classification was allowable. Under the House bill "wherever sex is a bona fide job qualification or disqualification for a particular job, Title VII does not require that equal job opportunity be given to both sexes." [110 C.R. 7217].

> "Examples of such legitimate discrimination would be the preference of a French restaurant for a French cook, the preference of a professional baseball team for male players, and the preference of a business which seeks the patronage of members of particular religious groups for a salesman of that religion." [110 C.R. 7213].

(4) The fourth major determination was made with respect to the manner of introducing the Bennett amendment (No. 1051), then the new substitute bill (No. 1052) and the voting of cloture immediately thereafter.[14] Voting of cloture prohibits, of course, the introduction of new amendments.

The new Dirksen-Humphrey substitute (No. 1052) included provisions excepting from the prohibition of unlawful employment practice "good faith merit system" and other exclusions intended to reach a number of problems, including the "testing" problem that had occupied so much of the Senate's attention.[15]

However, just before introducing the No. 1052, Senator Dirkson yielded to Senator Bennett who introduced No. 1051. Such was therefore on the table before

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[14]Immediately before offering amendment No. 1052, Senator Dirksen yielded the floor to Senator Bennett who introduced Amendment No. 1051 regarding the Equal Pay Act [110 C.R. 13310]. Immediately thereafter Senator Dirksen introduced No. 1052 (the Dirksen-Humphrey substitute), and almost immediately thereafter, the Senate adopted a motion for cloture [110 C.R. 13327 6/10/64]. The cloture motion had been pending for some time [110 C.R. 12831, 12860] but was not called to a vote until the Dirksen-Humphrey substitute (No. 1052) was introduced. One result of cloture was, of course, that the time of each senator to speak relating to H.R. 7152 and the many amendments thereto, was strictly limited.

[15]The discussion on testing was hardly a debate, since there seemed to be only one side. It was provoked by an administrative decision from Senator Dirksen's home state. The proponents of the civil rights bill were unanimous that such result was impossible under Title VII of the House bill. The "good faith merit system" provision was said to have been included in the Dirksen-Humphrey substitute to preclude interpreting "unlawful employment practices" more broadly than the Congress intended.

cloture was voted and the proponents of No. 1052 could *thereafter* accept it as an amendment to their bill.[16]

Senator Dirksen had earlier explained the necessity of treating "sex" and "race or color" differently:

> ". . . since discrimination on account of sex is a vastly different problem than discrimination because of race, color, or national origin, we should give further attention to the best manner to deal with that problem." [110 C.R. 6459 3/26/64].

Both Senators Dirksen and Humphrey expressly accepted the Bennett amendment as an amendment to *their* bill (No. 1052) and to explain the reason for adding it to their proposal No. 1052. Both Senators Dirksen and Humphrey explained that the amendment was necessary in order to carry the exemptions of the prior Act into the Title VII. (110 C.R. 13310, 13647.)

(5) The handling of the matter in this way avoided another major problem. One amendment placed on the table by Senators opposing *any* bill, proposed to add the word "solely" to the jurisdictional section. With respect to "race or color" such amendment would have appeared to require specific intent — that race or color was the *only* reason for adverse action and that an employer could avoid liability if he showed any *additional* reason for his action. Such amendment was unacceptable in that context of course.

However, by incorporating the exceptions and policies of the equal pay bill as to *compensation between the sexes,* the Senate could (and did) permit differential

[16]Since debate was limited by cloture, comment was necessarily brief [110 C.R. 13647 6/12/64].

compensation where not based on sex solely (but based on some other additional differential though correlated factor, such as longevity) without adding the word "solely" to the jurisdictional section which would have defeated the intent of the proponents of the bill on the other different subject of "race or color".

Accordingly, after the Dirksen-Humphrey bill (with the Bennett amendment) was substituted for the language of the House bill and was the pending business (110 C.R. 14239; 6/17/64), Senator Humphrey was asked a clarifying question as to the intent and effect of the bill in the area of different treatment of the sexes.

> "Mr. RANDOLPH. Mr. President, I wish to ask of the Senator from Minnesota (Mr. Humphrey), who is the effective manager of the pending bill, *a clarifying question* on the provisions of title VII.
>
> "I have in mind that the social security system, in certain respects, treats men and women differently. For example, widows' benefits are paid automatically; but a widower qualifies only if he is disabled or if he was actually supported by his deceased wife. Also, the wife of a retired employee entitled to social security receives an additional old age benefit; but the husband of such an employee does not. These differences in treatment as I recall, are of long standing.
>
> "Am I correct, I ask the Senator from Minnesota, in assuming that *similar differences of treatment in industrial benefit plans,* including earlier retirement options for women *may continue in operation under this bill, if it becomes law?*

"Mr. HUMPHREY: Yes. That point was made unmistakably clear earlier today by the adoption of the Bennett amendment, so there can be no doubt about it.

"Mr. RANDOLPH. I am grateful for the reply." [110 Cong. Rec. 13663-4 6/12/64] (Emphasis added).

The Senate, and especially Senator Humphrey was vitally aware of the need to make a legislative record as it did. (110 C.R. 4858.)

Finally, the Senate added the word "intentionally" with respect to the jurisdictional limitation. Again, as in the addition of "any reason other" in the House, the purpose was to express the intent of the bill as law—that action for another reason was not prohibited by the Act. (110 C.R. 12723-4.) It was made clear that "discrimination" had the same meaning it had had in FEPC laws and other laws for years. The Fair Labor Standards Act was also mentioned.[17]

3. *House Action.* When the Dirksen-Humphrey bill was passed by the Senate and returned to the House, the presentation to the House as to the effect of the Bennett Amendment stated:

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[17]"Objection: The language of the statute is vague and unclear. It may interfere with the employers' right to select on the basis of qualifications.

Answer: Discrimination is a word which has been used in State FEPC statutes for at least 20 years, and has been used in Federal statutes, such as the National Labor Relations Act and the Fair Labor Standards Act, for even a longer period.

To discriminate is to make distinctions or differences in the treatment of employees, and are prohibited only if they are based on any of the five forbidden criteria (race, color, religion, sex, or national origin); any other criteria or qualification is untouched by this bill." (110 C.R. 7218 4/8/64). See also Senator Humphrey quoting Justice Charles Whitaker, 110 C.R. 503-04 3/21/64; 110 C.R. 5437, 110 C.R. 7477).

"The Senate amendment also— . . .

"Second. Provides that compliance with the Fair Labor Standards Act as amended satisfies the requirement of the title barring discrimination because of sex—section 703(b): . . ." (110 C.R. 15896, 7/2/64).

III.

Administrative Interpretations of Law.

The questions of the Courts' responsibilities and the legal effect (if any) to be given administrative interpretations of the statutes was a matter carefully considered by the 88th Congress, both in regard to the Equal Pay Act, and in regard to Title VII.

Legislative intent is shown by what the Legislature *rejected* as well as by what it adopted. This point is important where, as here, the administration introduces a bill which Congress rejects, and the administration then asks the courts to give effect to the law enacted *as if* the Administration's bill had been enacted, when in fact Congress rejected it. Such a practice would seem to exceed the Constitutional duty "to take care that the laws be faithfully executed." (Art. II.)

1. Equal Pay Act. In enacting an equal pay bill, the controlling House Committee Report, and the debates on the House floor show that Congress established the Secretary of Labor as a prosecutor, and recognized that as such he had inherent authority to state his position. But his bulletins could only be used in Court as a shield for the defendant, not as a policy-making sword. It was entitled to weight only in defendant's favor.

The administrator could give "guidance" to those being regulated, but could *not* give "guidance" to the courts *against* defendant.

Congressman Goodell stated *inter alia:*

> "We are not allowing the Secretary of Labor to make decisions which exclude the court from an independent new interpretation of this Act, as to whether the words we use are being administered reasonably and properly." (110 C.R. 9198; 5/23/63.)

The Supplementary Views to the Committee Report stated in part:

> "Since this bill now before the House differs substantially from either last year's proposals or this year's administration bill, we feel that these changes should be pointed out. The following are the major differences between the bill reported by the full Education and Labor Committee and the earlier administration proposal. Under the committee bill:
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> . . .
>
> "4. Enforcement must be obtained in the Federal Courts and not arbitrarily through an all-powerful administrative body.
>
> . . .
>
> "11. The Secretary of Labor is not given broad regulatory and rule making authority. ['There would be no new regulations' 109 CR 9203.] . . ." House Report No. 309, 5/20/63; U.S. Code, Cong. and Adm. News pp. 689-90; 109 CR 9209 *et seq.*

The debates on the House floor showed the same intent:

"With reference to regulations, we have talked a great deal about this. It is an oversimplification but, generally speaking, *we have three different types of guidance that can be offered by the Administrators to those who are being regulated.* One of them is legislative regulation. . . .

"That was in the original proposal this year and it was in the proposal last year, granting legislative regulatory authority. It is out of this bill. We also knocked out the right of the Secretary of Labor *even to issue interpretative regulations.*

"*I emphasize that interpretative regulations are also barred.* . . . [italics added]

". . . The Secretary, in my opinion has the inherent authority to write interpretative bulletins. All this amounts to is *telling the public* the Secretary's interpretation of the law for the guidance of those who are to be regulated. *Such bulletins have no standing in court,* but they are there as a guidance to the court as to what the view of the administrator *was. They have no other significance, except that if an employer relies on this interpretative bulletin, he is protected.* He is not in violation if he has done something in reliance upon those interpretative bulletins . . ." (109 C.R. 9208-9209; 5/23/63.) (Emphasis added.)

". . . The Secretary may believe that a violation exists but the court *will make a second independent judgment.* This is very significant . . . (italics added)

"MR. THOMPSON of New Jersey. Indeed, we are not granting any such authority, but the fact

is that we are specifically and categorically restricting it, so that this is a negative action rather than a positive one." (109 C.R. 9198; 5/23/63.)

"Eighth, It is not intended that the Secretary of Labor or the courts will substitute their judgment for the judgment of the employer and his experts who have established and applied a bona fide job rating system." (109 C.R. 9209; 5/23/63.)

With respect to the procedure of proof by the prosecutor Congressman Goodell was also very clear:

"The burden will lie completely on the Department of Labor to establish a prima facie case that there is discrimination.

"When the burden of proof lies on the Secretary of Labor, I think it should be made clear that he must show that the violations are not based on a merit system, that he must show they are not based on a seniority system, that the violations he is claiming are not based on piece rates of production, and that the violations he is claiming occur are not based on any of the other factors other than sex. That is his burden.

"Having established the prima facie case in the Federal Court the burden itself will shift to the employer to prove or disprove the allegations of the Secretary of Labor. This is the procedure we have in mind. The employer does not have to prove the exceptions as an affirmative defense. The burden remains on the Secretary of Labor to prove that the exceptions do not apply. We do not have in mind the Secretary of Labor's going into an establishment and saying, 'Look,

you are paying the women here $1.75 and the men $2.10. Come on in here, Mr. Employer, and you prove that you are not discriminating on the basis of sex.' That would be just the opposite of what we are doing." 109 C.R. 9208.

2. Title VII. The House Committee adopted the Justice Department civil rights bill with a minimum of debate. However, the House Committee proposed a number of *clarifying* amendments on the House floor. One of these was to insert the word *"procedural"* regulations to make clear that the EEOC had *no* authority as to interpreting *substantive* law. (110 C.R. 2575.) The amendment was added "to make more definite the limitation on his powers". A second was to insert the requirement that there must be "reasonable cause" before the EEOC brings suit. The purpose was "to protect us from an errant and arrogant bureaucracy. . . ." (110 C.R. 2563.) Even as to the procedural regulations, public hearing was (and is) required. (110 C.R. 2573.)

Under the House bill the EEOC was a prosecutor, just as is the Secretary under the Equal Pay Act. As such the EEOC would have inherent authority to announce its position, but the intent of Congress was that the courts exercise their judgment, *independent* of the administrator. (110 C.R. 2575.)

When the bill reached the Senate, the Senate further narrowed EEOC authority.

After Title VII was adopted however, to create an erroneous *impression* that the EEOC had authority to interpret the law, and in the expectation that "busy federal judges" would defer to such interpretations re-

gardless of their validity,[18] the EEOC "adopted 'guidelines' (since it has no substantive rulemaking power)" (Blumrosen, *infra* at 698). It issues such "guidelines" without any public hearing. Further, for the purpose of developing decisional "law", the EEOC decided to give the "reasonable cause" provision the appearance of a quasi-judicial decision (Blumrosen, *infra* at 733). These efforts are described by one of the architects of this EEOC policy, in Blumrosen, "Administrative Creativity: The First Year of the Equal Employment Opportunity Commission, 38 Geo. Wash. L.Rev. 694 (1970) (Compare Constitution Art. II, §3 which provides that the executive "shall take care that the laws be *faithfully* executed").

A significant additional note is that in 1966, EEOC accurately represented its own authority in its *first* guidelines on testing. That authority was there represented as being "the Commission recommends" and

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[18]"The choices here were not dictated by statutory language or by legislative history. They were the product of the judgment of the original Commissioners, responding to views developed by a small group of lawyers."
Blumrosen, op. cit. supra at 711.
"My interpretation was received with some incredulity by the other lawyers, who were slowly getting accustomed to my free and easy ways with statutory construction."
Blumrosen, op. cit. supra at 730.
"Thus, the interpretations were basically products of the various attorneys, shaped minimally by extrinsic aids, and leavened by the policy orientation of the Commissioners."
Blumrosen, op. cit. supra at 704.
". . . It seemed likely that busy federal judges would pay considerable attention to the concept of discrimination developed by the Commission through the decisional process. The reasonable cause finding thus became a vehicle for development of the law with respect to discrimination."
Blumrosen, op. cit. supra at 733.

the "Commission advocates" certain things. It was only after certiorari was granted in *Griggs v. Duke Power supra*, that new guidelines on testing were issued (without public notice or input) and the same were attached as an exhibit to a brief. The new format was a *regulation format*, complete with section numbers. It contained EEOC's new "definition" of "discrimination".

Administrative pronouncements of the EEOC and Wage and Hour Administrator are clearly on the same level and entitled to equal weight. But since they are the pronouncements of prosecutors, they may not be used in court *against* the defendant, who is entitled under the statutes to have issues of law and fact determined *de novo* by a court.

IV.

1972 Congressional Action.

The 1972 Congressional action is most significant herein for the things Congress rejected.

Substantially identical bills were introduced in both houses, but the Committees in each house treated them differently.

In the House Committee, a majority approved the original bill; a large minority dissented. In the Senate, major modifications were made in the original bill in the Committee itself.

On the House floor, the Committee bill was defeated; the bill proposed by the minority of the House Committee was adopted in its place. Thus the House Com-

mittee majority report represents views *rejected* in the House; the minority report represents the House intent.

In the Senate, additional major modifications were also made on the Senate floor.

For example, the subsequently rejected House Committee report reflected an intent to recognize peculiar factual expertise or perception in the agency, and to redefine unlawful discrimination.

> "Experts familiar with the subject generally describe the problem in terms of 'systems' and 'effects' rather that simply intentional wrongs. . . . Particularly to the untrained observer their discriminatory nature may not appear obvious at first glance. . . ." House Report No. 92-238, 1972 U.S. Code, Cong., and Adm. News, Vol. 2, p. 2144.

The subsequently rejected Committee majority view thought to transfer affirmative action functions to the EEOC to develop a new definition of discrimination.

> "Clarity, uniformity, and predictability in policy and practice are aided by having the definition of discrimination and the shaping of remedies *developed* by a single agency." (*Id.* at 2150) (emphasis added).

(In the Senate in contrast, it was considered that if this affirmative action program were put under EEOC's roof different standards of the two programs should be kept separate. The Senate decided *not* to join the two *different* approaches in a single agency).

It was also proposed by the majority of the House committee to give the EEOC authority "for issuing basic guidelines to coordinate and give guidance to the compliance program." (*Id.* at p. 2152)

The minority of the House committee whose bill prevailed in the House did not accept the premises of peculiar expertise or of authority to issue guidelines that have standing in court. They stated that their amendments would place the burden on the EEOC as a prosecutor, to prove in a court of law that a defendant who was presumed innocent, had violated the law. (*Id.* at 2157-68) Their view which prevailed was that EEOC "cannot be an impartial arbiter of the law. An advocate, by nature, represents one side of the issue." (*Ibid.*). The floor debates are likewise replete with concern over the bias of the agency.[19]

The Senate likewise decided to make the EEOC a prosecutor.

Of course Congress rejected proposals to delegate to EEOC quasi-legislative and quasi-judicial authority.

As to the possibility of redefining unlawful employment practices (or unlawful discrimination in an employment context), the subsequent Conference Committee made clear that no re-definition was intended or authorized beyond the statutory definition of unlawful employment practices. The Conference Committee Report shows that the legislation provided authority for additional judicial remedies if (but only if) an unlawful employment practice as statutorily defined had been committed. It precluded judicial remedies *unless* such unlawful employment practice as so defined had been committed. Thus the limitation of jurisdiction to the courts under the statute, was intended to preclude a

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[19]For example, Senator Saxbe said in part, "However, too often we would find—and I speak as a former attorney general who handled the legal aspects of this matter—that in their zealousness to try to protect the civil rights of some people they were also eager to violate the civil rights of others." (118 C.R. 731; 1/21/72). See also 118 C.R. 731, 594, 699, 701.

"common-law making" role or an evolutionary judicial re-definition of what constitutes unlawful discrimination in an employment context. It specifically requires "adverse actions" as defined (and not "effects") be shown and requires that there be an intent to discriminate whether intent is measured by an objective or subjective test in a particular case.

Thus the Conference Committee Report shows that all the major premises of the legislation proposed by the majority of the committee of the House were rejected. The Conference Committee Report says in part:

> "1. The Senate amendment required a finding that the respondent engaged in an unlawful employment practice and the House bill required a finding that respondent 'intentionally' engaged in such unlawful employment practice.
>
> . . .
>
> "4. The House bill restated the provisions of existing law prohibiting court ordered remedies based on any adverse action except unlawful employment practices prohibited under Title VII.
>
> . . .
>
> "The Senate receded with an amendment that provides the following:
>
> "1. A finding that the respondent has intentionally engaged or is intentionally engaging in an unlawful employment practice, as the language of the current law reads.
>
> . . .
>
> "4. The provisions of existing law prohibiting court ordered remedies based on any adverse action except unlawful employment practices under Title VII are retained." (Conference Report, U.S. Cong. & Adm. News (1972) v. 2, p. 2183.)

This action by the Congress in 1972 explicitly reaffirmed the action in 1964.

In 1964, the original legislative proposal permitted the courts to apply remedies unless the action of the employer had been "for cause." This implied a very broad authority in the courts. It also implied that the burden was on the employer to show that the "failure to hire" etc. was for cause.

The House Committee changed the language on the House floor to make clear that actions by the employer "for any reason other" than the prohibited five reasons were *not* unlawful and it is outside the jurisdiction of the court to order remedies unless the employer's was for a prohibited reason. (110 C.R. 2566, 2/8/64.)

When the bill reached the Senate, the Senate added the word "intentional" as a clarifying change. (110 C.R. 12723-4.) Again, as in the House, the view of the *proponents* of the bill was that discrimination was action for a reason and that unlawful discrimination was action for one of the five reasons stated by the statute.[20]

Accordingly, the word "intentional" clarified that meaning; but also precluded judicial expansion of the definition.

By reaffirming those jurisdictional limitations in 1972, Congress reaffirmed the 1964 law.

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[20]The proponents of the legislation repeatedly pointed out that the word "discrimination" (in an unlawful sense) had a settled legal meaning, as it was used in F.E.P.C. statutes in about half the States, as well as in the National Labor Relations Act, the Interstate Commerce Act, and the Federal Aviation Act. See, e.g. 110 Cong. Rec. 6549, 7218, 5803-4, 5437, 7477.

V.
Legislative Intent vs. Interpretive Bulletin On Employer Costs.

Bulletins issued by the prosecuting agencies (EEOC and Wage and Hour Administrator) are often simply *arguments* for a particular point of view, and here are *contrary* to the statute and not faithful interpretations of the statute at all.

The bulletin relied on in the decision below on rehearing, for example, contradicts the major premise of the statutes it purports to interpret.

The Equal Pay Act says it is unlawful to "discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the wages which he pays wages to employees of the opposite sex . . . except where such payment is made pursuant to . . . a differential based on any other factor other than sex."

The bulletin relied on by the majority below says in part:

> "To group employees solely on the basis of sex for purposes of comparison of costs necessarily rests on the assumption that the sex factor alone may justify the wage differential—an assumption plainly contrary to the terms and purpose of the Equal Pay Act."

Obviously, the bulletin is not logical nor is it a faithful interpretation of the statute. It is instead a specious argument as to the supposed policy of the statute.

Congress blended several policies in enacting the statute. The administrator may not "legislate" a *single* policy for execution of the statute.

The statute says that if there is another differential factor (sex plus some other factor such as differential cost) differential wages may be paid.

To urge, as the bulletin does that no differentiation upon the basis of sex may be made, even for the purpose of showing the factors of difference between the sexes is tantamount to repeal of the statute.

It is also directly contrary to that portion of Title VII which construes the Equal Pay Act by saying:

> "It shall *not* be an unlawful employment practice . . . for an employer *to differentiate upon the basis of sex* in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by [the Equal Pay Act]."

The bulletin is also contrary to the legislative history on the subject of "costs" as another factor as we have shown.

By stating that certain "defenses" are *not* available, the administrator has re-written the prohibition.

By issuing such "bulletins" or "guidelines" the agency incorrectly stated statutory purposes and meaning. When such bulletins or guidelines are relied on by the courts to hold against defendant, the defendant is thereby deprived of its substantive legal rights as well.

EXHIBIT D.

Charter Sections 220.1(1)(a) and (g).

Sec. 220.1. The Department of Water and Power shall also have the power and duty:

(1) To establish and maintain within said Department a general plan and system of retirement, disability, and death benefits, and, in cooperation with its eligible and participating employees, to provide currently out of the Water Revenue Fund and the Power Revenue Fund a portion of the cost under said plan and system, including expenses incident to the administration thereof, subject, however, to the following provisions, to-wit:

(a) That such plan and system shall be maintained in accordance with sound business practices and recognized actuarial methods, and the respective contributions of said employees and said Department, whether prescribed by present or future provisions of said plan and system, may be modified or adjusted, subject to the direction and approval of the Board of Water and Power Commissioners, whenever the Board of Administration, as hereinafter designated, shall find that said business practices or said actuarial methods require such modification or adjustment;

* * *

(g) That such Board of Administration shall at regular intervals, each not exceeding a period of five years, secure a general survey and actuarial report of said plan and system, and said Board, subject to the direction and approval of the Board of Water and Power Commissioners, shall from time to time amend said plan and system in such manner as may be found to be advisable to meet changed conditions, or, as in the light of experience, may be considered necessary;

* * *